

CH. 53

UNLAWFUL USE OF WEAPONS

§53-1 [Generally \(CumDigest\)](#)

§53-2 [Felony Based on Prior Conviction \(CumDigest\)](#)

§53-3 [Proof of Possession \(CumDigest\)](#)

§53-4 [Proof of Concealed Weapon](#)

§53-5 Exemptions

(a) [Inaccessible or "Broken Down" Weapon](#)

(b) [On Own Land or In Own Abode \(CumDigest\)](#)

(c) [Other Exemptions \(CumDigest\)](#)

[Top](#)

§53-1

Generally

[People v. Izzo, 195 Ill.2d 109, 745 N.E.2d 548 \(2001\) 720 ILCS 5/21-6](#), which prohibits possessing or storing certain weapons "in any building or on land supported in whole or in part with public funds . . . without prior written permission from the chief security officer for such land or building," is not unconstitutionally vague for failing to define the phrase "chief security officer." In addition, the statute was not unenforceable because it had not been published on school grounds or the students notified of its provisions; "one's ignorance of the law does not excuse unlawful conduct."

[People v. Carter, 213 Ill.2d 295, 821 N.E.2d 233 \(2004\) 720 ILCS 5/24-1.1\(a\)](#), which prohibits the possession of "any firearm or any firearm ammunition" by a person who has been convicted of a felony, does not authorize multiple convictions for the simultaneous possession of multiple types of firearms and ammunition. Therefore, defendant could properly be convicted of only one count of unlawful possession of weapons by a felon where he simultaneously possessed a .22 caliber handgun, a .25 caliber handgun, and 2 clips of ammunition.

[People v. Greene, 96 Ill.2d 334, 450 N.E.2d 329 \(1983\)](#) The Court held that due process was not violated because one section of the Unlawful Use of a Weapons statute made possession of a bomb a Class 3 felony while another section made possession of a bomb merely a misdemeanor. One paragraph was intended to prohibit bombs containing explosives, while the other was intended to prohibit bombs containing "noxious liquid gas." Because the provisions are aimed at separate offenses, the disparity in punishment is reasonable and does not violate due process. The Court also held that the term "bomb" is not unconstitutionally vague.

[People v. Fink, 91 Ill.2d 237, 437 N.E.2d 623 \(1982\)](#) The defendant was charged with unlawful use of weapons for possessing a nightstick. The Court held that a nightstick is not a "bludgeon" but is a "billy" within the classification of weapons in the Unlawful Use of Weapons statute.

[People v. Rutledge, 104 Ill.2d 394, 472 N.E.2d 438 \(1984\)](#) Defendant was convicted of possession of a deadly weapon with intent to use it unlawfully. The charge arose from defendant's possession of a gun during an altercation in a store parking lot. Defendant contended that a gun or firearm is not included in ¶24-1(a)(2), which provides that a person commits unlawful use of a weapon when he knowingly "[c]arries or possesses with intent to use the same unlawfully against another, a dagger, dirk, billy, dangerous knife, razor, stiletto, broken bottle or other piece of glass, stun gun or taser or any other dangerous or deadly weapon or instrument of like character." After discussing the history of this provision, its various reenactments, and court decisions interpreting prior versions, the Court concluded that the Legislature did not intend that firearms be included in the term "or any other dangerous or deadly weapon or instrument of like character."

[People v. Robinson, 319 Ill.App.3d 459, 748 N.E.2d 624 \(2d Dist. 2001\)](#) Under [720 ILCS 5/24-1\(a\)\(7\)\(iii\)](#), UUW is committed by possession of a bomb only where the bomb contains "an explosive substance of over one-quarter ounce. . ."

[People v. Olsen, 302 Ill.App.3d 512, 707 N.E.2d 116 \(1st Dist. 1998\)](#) Defendant was convicted of violating [720 ILCS 5/24-1\(a\)\(7\)](#), which defines the offense of unlawful use of weapons as knowingly manufacturing

or possessing any "bomb, bomb-shell, grenade, bottle or other container containing an explosive substance of over one-quarter ounce for like purposes, such as, but not limited to, black powder bombs and Molotov cocktails or artillery projectiles." The Court reversed the conviction, finding that the evidence was insufficient to prove guilt beyond a reasonable doubt. Under [People v. Greene, 96 Ill.2d 334, 450 N.E.2d 329 \(1983\)](#), §24-1(a)(7) applies only to "explosive devices" (i.e., those designed to cause unlawful destruction or injury when detonated). The devices which defendant manufactured did not explode - in fact only one burned at all. The State's expert claimed only that they could explode depending on the fuel-to-air mixture inside each device, and a defense expert had to alter the devices' design to get them to burn and testified that the fuel-to-air ratio of the original devices would have prevented them from exploding. Finally, defendant testified that she was trying to make lanterns.

[People v. Carmichael, 343 Ill.App.3d 855, 799 N.E.2d 401 \(1st Dist. 2003\)](#) Unlawful use of a weapon by a felon (by a person who is not confined to a penal institution) is a Class 3 felony carrying a prison sentence of between two and 10 years. Where the offense is committed by a person who has been convicted of a "forcible felony," however, it is a Class 2 felony carrying a sentence of not less than three nor more than 14 years. ([720 ILCS 5/24-1.1\(e\)](#)). Because armed violence is a "forcible felony" only if in a particular case it involved the use or threat of physical force (see [People v. Belk, 203 Ill.2d 187, 784 N.E.2d 825 \(2003\)](#)), the trial court erred by imposing a Class 2 sentence where the State failed to present evidence concerning the circumstances of defendant's prior armed violence conviction.

[People v. Grant, 339 Ill.App.3d 792, 791 N.E.2d 100 \(1st Dist. 2003\)](#) The Appellate Court rejected the argument that the Aggravated UYW statute ([720 ILCS 5/24-1.6\(a\)\(1\)\(3\)\(A\)](#)) violates due process because it does not require a culpable mental state, and therefore may criminalize innocent conduct. Aggravated unlawful use of a weapon is committed when the defendant knowingly carries in a vehicle an uncased, loaded and immediately accessible firearm.

[People v. Kohl, 364 Ill.App.3d 495, 847 N.E.2d 150 \(2d Dist. 2006\)](#) Defendant, who was on parole, was charged with two counts of unlawful possession of a weapon by a felon based upon the State's claim that a knife with finger grips constituted "metal knuckles." Under Illinois law, defendant could be convicted of unlawful possession of a weapon by a felon based upon mere possession of "metal knuckles," but could be convicted of the same offense based on possession of a knife only if he intended to use the knife unlawfully. The primary objective when construing the meaning of a statute is to give effect to the legislature's intent. In doing so, a court must presume that the legislature did not intend unjust, inconvenient, or absurd results. In addition, any ambiguity in a penal statute must be construed in favor of the accused. Because the term "metal knuckles" is not defined by the statute the court examined several dictionary definitions before concluding that the term should be defined as a device which fits across the fingers and which is intended to both protect the fingers and increase the power and impact of a punch. The court concluded that a knife does not constitute "metal knuckles" merely because it has finger grips which would make contact with a victim's body only if the knife blade was buried in his or her body. "Metal knuckles are in a category of weapons primarily designed to inflict injury by strengthening the power of a punch."

[People v. Runge, 346 Ill.App.3d 500, 805 N.E.2d 632 \(3d Dist. 2004\)](#) A conviction for possession of contraband in a penal institution was reversed because the contraband - a canister of pepper spray - was not a "weapon" under [720 ILCS 5/31A-1.1\(c\)\(2\)\(v\)](#). Section 31A-1.1(c)(2)(v) defines a "weapon" as any of several "devices or implements designated in subsections (a)(1), (a)(3) and (a)(6)" of [720 ILCS 5/24-1](#), and "any other dangerous weapon or instrument of like character." Section §24-1 includes several specific weapons, but specifically excludes "an object containing a non-lethal noxious liquid gas or substance designed solely for personal defense carried by a person 18 years of age or older." ([720 ILCS 5/24-1\(a\)\(3\)](#)). The court concluded that the pepper spray in question was expressly excluded from being a "weapon" under

§24-1(a), and therefore was not a "dangerous weapon or instrument of like character" under §31A-1.1(c)(2)(v).

People v. Shields, 337 Ill.App.3d 1063, 787 N.E.2d 342 (1st Dist. 2003) A handgun was not "immediately accessible," as required to sustain a conviction for aggravated unlawful use of a weapon, where it had been concealed in a woman's glove and placed under the hood of a car next to the battery. A weapon is "immediately accessible" if it is within "easy reach" of the defendant. The court rejected the State's argument that the weapon was "immediately accessible" because defendant was standing outside the car and was "seconds away" from the weapon. The evidence made it clear that defendant was ordered out of the car by the police.

People v. Velez, 336 Ill.App.3d 261, 783 N.E.2d 226 (2d Dist. 2003) Under 720 ILCS 5/24-1(a)(1), the offense of unlawful use of a weapon occurs where a person knowingly sells, manufactures, purchases, possesses, or carries any "knife, commonly referred to as a switchblade knife, which has a blade which opens automatically by hand pressure applied to a button, spring, or other device in the handle of the knife." The court held that a knife with a blade that was designed to open automatically when a button on the handle was pressed, but did not operate in that manner because the knife did not function properly, was prohibited under §24-1(a)(1). Therefore, defendant committed the offense of U UW although his knife did not open automatically when the button was pushed. The court noted that in **People v. Martinez**, 285 Ill.App.3d 881, 674 N.E.2d 944 (1st Dist. 1996), the defendant was convicted of U UW for possessing a broken stun gun which was incapable of producing an electrical current. "Like the stun gun in **Martinez**, the character of the knife in this case did not change merely because it did not operate properly." Because the U UW statute reflects a strong public policy discouraging items which "have the appearance or characteristics" of a prohibited weapon, a defendant "may be found guilty of U UW if he possesses a malfunctioning or inoperable" weapon.

People v. Martin, 121 Ill.App.3d 196, 459 N.E.2d 279 (2d Dist. 1984) The defendant was charged with and convicted of unlawful use of weapons under ¶24-1(a) (armed and masked in such a manner as to conceal his identity). The testimony showed that during the incident the offender wore "tinted pink or peach glasses and a ski hat." However, an eyewitness testified that the glasses were not sunglasses and did not interfere with her view of the subject. The Court held that the evidence fell "far short of establishing that defendant was masked in such a manner as to conceal his identity."

Cumulative Digest Case Summaries §53-1

McDonald v. Chicago, ___ U.S. ___, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), 2010 WL 2555188 (2010)

1. In **District of Columbia v. Heller**, 554 U.S. ___, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), the court found that the 2nd Amendment includes the right to possess handguns in one's home for the purpose of self-defense. **Heller** invalidated a federal act prohibiting the possession of handguns in homes in the District of Columbia.

Heller recognized, however, that the right to keep and bear arms does not allow a citizen to keep or carry a weapon for all purposes. In particular, the **Heller** court specifically stated that it did not intend to cast doubt on such regulatory measures as: (1) prohibiting the possession of firearms by felons and the mentally ill, (2) restricting firearms in sensitive places such as schools and government buildings, and (3) imposing conditions on the commercial sale of firearms.

2. Here, the Supreme Court found that the 2nd Amendment applies to the States through the due process clause of the 14th Amendment. The court invalidated two municipal ordinances which in effect banned the possession of handguns by most private citizens.

A. Section 1 of the 14th Amendment provides that States may not abridge "the privileges or

immunities of citizens of the United States” or deprive “any person of life, liberty, or property, without due process of law.” The court declined to reconsider its precedent concerning the scope of the “privileges and immunities” clause, finding that under modern jurisprudence the application of the Bill of Rights to the States is determined under the 14th Amendment’s due process clause.

B. Whether specific protections of the Bill of Rights apply to the States depends on whether the particular right in question has been “incorporated” into the concept of “due process” under the 14th Amendment. A right is incorporated if it is fundamental to the Constitution’s “scheme of ordered liberty and system of justice.” Rights which are deeply rooted in the nation’s history and tradition are deemed to be fundamental, and are therefore applied to the States.

C. The right to bear arms for the purpose of self-defense is deeply rooted in the nation’s history and tradition, and is therefore a fundamental right to be applied to the States through the 14th Amendment. The court did not elaborate on the extent to which States may constitutionally regulate the possession and ownership of firearms, but held that the municipal ordinances at issue here were clearly unconstitutional.

In re Jordan G., 2015 IL 116834 (No. 118634, 2/20/15)

The respondent minor was charged in a delinquency petition with three counts of aggravated unlawful use of a weapon and one count of unlawful possession of a firearm. The AUUW counts alleged that respondent carried an uncased, loaded, and immediately accessible firearm in a vehicle (§24-1.6(a)(1), (a)(3)(A)), carried a handgun in a vehicle while he was under the age of 21 ([720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(I\)](#)), and carried a firearm in a vehicle without having been issued a FOID card ([720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(C\)](#).) The unlawful possession of a firearm count alleged that respondent was under the age of 18 years and carried a firearm which was capable of being concealed on his person ([720 ILCS 5/24-3.1\(a\)\(1\)](#)).

The trial court dismissed the three AUUW counts after finding that §24-1.6 had been found facially unconstitutional on Second Amendment grounds in [Moore v. Madigan, 702 F.3d 933 \(7th Cir. 2012\)](#).

1. The Supreme Court concluded that **Moore** and [People v. Aguilar, 2013 IL 112116](#), held only that the Second Amendment was violated by a “blanket prohibition on carrying weapons in public.” In fact, the modified **Aguilar** opinion specifically stated that the holding was limited to finding that the Class 4 form of AUUW ([720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(A\), \(d\)](#)) was facially unconstitutional because it enacted a comprehensive ban on the possession of an uncased, loaded and immediately accessible firearm. Both **Moore** and **Aguilar** specifically noted that reasonable restrictions on Second Amendment rights are permitted.

2. The court rejected the argument that the FOID and “under 21” provisions cannot be severed from the provision found unconstitutional in [Aguilar](#). The issue of severability involves questions of statutory interpretation and legislative intent. Where a statute does not contain its own severability provision, the severability section of the Statute on Statutes is utilized. That statute provides that the invalidity of one provision of a statute does not affect other provisions which can be given effect without the invalid provision. ([5 ILCS 70/1.31](#)).

The Supreme Court concluded that AUUW is comprised of carrying a weapon (subsections (a)(1) and (a)(2)) where one of several factors is present, including that the firearm is uncased, loaded and immediately accessible, the person possessing the firearm does not have a FOID card, or the person possessing the weapon is under the age of 21. Thus, subsection (a)(3)(A), which was invalidated in [Aguilar](#), is just one of several aggravating factors that can operate in conjunction with subsections (a)(1) and (a)(2) to constitute the substantive AUUW offense. The court concluded that removing the provision struck down by **Aguilar** does not undermine the remaining factors, which can be executed on their own. Thus, the FOID card and “under 21” restriction stand independently of the provision that was held unconstitutional in [Aguilar](#).

3. When analyzing a Second Amendment challenge, the court applies a two-step process. First, the court conducts a textual and historical analysis to determine whether the challenged state law imposes a

burden on conduct that was understood to be within the scope of the Second Amendment's protection at the time of ratification. If the challenged law regulates activity which fell outside the scope of the Second Amendment right as it was understood at the relevant historical time, the regulated activity is categorically unprotected and is not subject to further Second Amendment review.

If the historical evidence is inconclusive or suggests that the regulated activity is protected, then the court must apply the appropriate level of scrutiny and inquire into the strength of the State's justification for regulating or restricting the activity.

The defense acknowledged that the possession of weapons by persons under the age of 18 falls outside the protection of the Second Amendment, but argued that the Second Amendment rights of persons between the ages of 18 and 21 are violated by subsections (a)(1), (a)(3)(C) and (a)(1), (a)(3)(I), which restrict the possession of weapons by persons under the age of 21.

The court concluded that there is no recognized right for minors to own and possess firearms, and that restrictions on the ability of minors to possess weapons have traditionally been interpreted as lasting until age 21. Thus, the possession of handguns by persons between 18 and 21 constitutes conduct that is outside the scope of Second Amendment protection.

4. The court rejected the State's request that it modify the **Aguilar** holding that the Class 4 form of aggravated unlawful use of a weapon is unconstitutional on its face.

[People v. Aguilar, 2013 IL 112116 \(No. 112116, modified 12/19/13\)](#)

1. The Second Amendment protects an individual's right to keep and bear arms for the purpose of self-defense, and is applicable to the states through the due process clause of the Fourteenth Amendment. While the need for self-defense is most acute in the home, the constitutional right to armed self-defense is broader than the right to have a gun in one's home. The Second Amendment guarantees not only the right to "keep" arms, but also the right to "bear" arms, which implies a right to carry a loaded gun outside the home. Because the Class 4 form of the AUUW statute ([720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(A\), \(d\)](#)) categorically prohibits the possession and use of an operable weapon for self-defense outside the home, it violates the Second Amendment on its face.

In a footnote, in response to the State's rehearing petition, the court emphasized that its holding was limited to the Class 4 form of the statute, and it was making no finding, express or implied, with respect to the constitutionality of any other section or subsection of the AUUW statute.

2. The right to keep and bear arms for self-defense is not unlimited and may be subject to reasonable regulation. The United States Supreme Court has not identified the possession of handguns by minors as conduct that may be constitutionally regulated, but laws banning the juvenile possession of firearms have been commonplace for almost 150 years, and comport with longstanding practice of prohibiting classes of persons whose possession poses a particular danger to the public from possessing firearms. While many colonies permitted or even required minors to own and possess firearms for purposes of militia service, no right for minors to own or possess firearms existed at any time in the history of the nation. Therefore, the unlawful possession of firearms statute prohibiting persons under 18 years of age from possessing any firearm of a size that may be concealed on the person ([720 ILCS 5/24-3.1\(a\)\(1\)](#)) comports with the Second Amendment.

The court reversed defendant's conviction for AUUW and affirmed his conviction for unlawful possession of a firearm.

Garmen, C.J., dissented upon the denial of rehearing. It would be preferable for the court in response to the State's rehearing petition to allow the parties to fully brief and argue the constitutionality of other sections and subsections of the statute.

Theis, J., dissented upon the denial of rehearing. The majority's unexplained modification of its decision upon denial of rehearing adopts an entirely new way of analyzing the constitutional claim by incorporating the sentencing provisions into its analysis. This new holding has the potential to alter the court's constitutional jurisprudence and create a host of practical problems for law enforcement. It is

unsupported by any authority. Rehearing should have been granted to allow the parties to address whether the statute is unconstitutional in all of its applications.

(Defendant was represented by Assistant Defender David Holland, Chicago.)

People v. Almond, 2015 IL 113817 (No. 113817, 2/20/15)

Defendant, a convicted felon, was properly convicted of two separate firearm offenses based on his simultaneous possession of a firearm and the firearm ammunition that was loaded in the gun. The court held that the UUW by a felon statute specifically authorizes two separate convictions for simultaneously possessing a firearm and firearm ammunition, and the two convictions did not violate the one act/one crime rule.

1. The UUW by a felon statute makes it unlawful for a person who has been convicted of a felony to possess any firearm or firearm ammunition. [720 ILCS 5/24-1.1\(a\)](#). The statute specifically states that “the possession of each firearm or firearm ammunition in violation of this Section constitutes a single and separate violation.” [720 ILCS 5/24-1.1\(e\)](#). The court held that based on this language, the statute unambiguously authorizes separate convictions when a felon possesses a loaded firearm: a conviction for possessing the firearm, and a conviction for possessing the ammunition inside the firearm.

2. The court also held that multiple convictions did not violate the one act/one crime rule. Under that rule, a defendant may not be convicted of multiple offenses based on the same physical act. But multiple convictions are permitted in cases where a defendant commits several acts, even if they are interrelated. An act is defined as any overt or outward manifestation that will support a conviction.

Here defendant possessed two separate and distinct items of contraband, a firearm and ammunition. Although his possession was simultaneous, that fact alone did not render his conduct a single act. Instead, defendant committed two separate acts: possession of a firearm and possession of ammunition. Each act was materially different, even if both items were possessed simultaneously.

Defendant’s multiple convictions were affirmed.

(Defendant was represented by Assistant Defender Ginger Odom, Chicago.)

People v. Burns, 2015 IL 117387 (No. 117387, 12/17/15)

1. The aggravated unlawful use of a weapon statute provides, in part:

(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:

(1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person . . . [,] or

(2) Carries or possesses on or about his or her person, upon any public street, alley, or other public lands within the corporate limits of a city, village or incorporated town . . . ; and

(3) One of the following factors is present:

(A) the firearm possessed was uncased, loaded and immediately accessible at the time of the offense; . . .

(C) the person possessing the firearm has not been issued a currently valid Firearm Owner’s Identification Card[.] . . .

(d) Sentence. Aggravated unlawful use of a weapon is a Class 4 felony; a second or subsequent offense is a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years. Aggravated unlawful use of a weapon by a person who has been previously convicted of a felony in this State or another jurisdiction is a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years. [720 ILCS 5/24-1.6](#).

Thus, to convict of aggravated unlawful use of a weapon, the State must prove beyond a reasonable doubt that the defendant was either carrying a firearm on his person or in his vehicle (720 ILCS 5/24-

1.6(a)(1)) or was carrying or possessing a firearm while on a public way ([720 ILCS 5/24-1.6\(a\)\(2\)](#)), and that one of the factors set forth in subsection (a)(3) was present. Under [720 ILCS 5/24-1.6\(d\)](#), AUUW is a Class 4 felony unless the defendant has previously been convicted of a felony, in which case the offense is a Class 2 felony.

2. In [People v. Aguilar, 2013 IL 112116](#), the Supreme Court held that §24-1.6(a)(1), (a)(3)(A) is facially unconstitutional because it constitutes a ban on the right to keep and bear arms under the Second Amendment. On rehearing, the court modified the opinion to state that the finding of unconstitutionality was limited to the “Class 4 form” of AUUW.

The court stated that there is no “Class 4 form” or “Class 2 form” of AUUW, and that it erred in the **Aguilar** modified opinion by limiting the opinion to the “Class 4 form” of the offense. The elements of AUUW are contained in subsection (a) of the statute, and the offense is complete when those elements are established. The distinctions between Class 4 and Class 2 are created by subsection (d) of the statute, which affects sentencing but does not create “separate and distinct” offenses of AUUW.

Thus, contrary to the modified opinion in [Aguilar](#), §24-1.6(a)(1), (a)(3)(A) “is facially unconstitutional, without limitation.” In other words, Section 24-1.6(a)(1), (a)(3)(A) cannot serve as the basis for an AUUW conviction of any class.

3. The court rejected the State’s argument that §24-1.6(a)(1), (a)(3)(A) is not facially unconstitutional because it presents no constitutional problems when applied to persons with prior felony convictions. When assessing whether a statute is facially unconstitutional because it violates the constitution in all applications, a court will consider only scenarios in which the statute actually authorizes or prohibits the conduct at issue.

Because as enacted by the legislature the offense defined by §24-1.6(a)(1), (a)(3)(A) does not include as an element that the offender has a prior felony conviction, any possible application to prior felons could not be considered in deciding whether the statute is facially unconstitutional.

Defendant’s conviction for aggravated unlawful use of a weapon was vacated.

(Defendant was represented by Assistant Defender Adrienne N. River, Chicago.)

People v. Holmes, 241 Ill.2d 509, 948 N.E.2d 617 (2011)

1. The aggravated UUW statute exempts from its prohibition firearms that are “unloaded and enclosed in a case, firearm carrying box, shipping box, or other container by a person who has been issued a currently valid Firearm Owner’s Identification Card.” [720 ILCS 5/24-1.6\(c\)\(iii\)](#). In [People v. Diggins, 235 Ill.2d 48, 919 N.E.2d 237 \(2009\)](#), the court held that a firearm stored in the center console of a vehicle qualifies for the exemption as a firearm enclosed in a case.

The defendant was charged with aggravated UUW for carrying an “uncased, loaded and immediately accessible” firearm in his vehicle in violation of [720 ILCS 5/24-1.6\(a\)\(1\)\(3\)\(A\)](#). Relying on [Diggins](#), the court held that the State failed to prove that the firearm was uncased where it was undisputed that the police recovered the firearm from within a closed and latched backseat armrest, because that container “fell within the meaning of a case under section 24-1.6.”

2. A person commits the offense of aggravated UUW when he carries a firearm in his vehicle and “has not been issued a currently valid Firearm Owner’s Identification Card.” [720 ILCS 5/24-1.6\(a\)\(1\)\(3\)\(C\)](#). The FOID Card Act provides that no person may acquire or possess a firearm in Illinois without a FOID card, but exempts from its requirement “[n]onresidents who are currently licensed or registered to possess a firearm in their resident state.” [430 ILCS 65/2\(b\)\(10\)](#).

The non-resident exemption of subsection (b)(10) is incorporated into the UUW statute, and therefore a valid permit or license from another state can substitute for the FOID card requirement of [720 ILCS 5/24-1.6\(a\)\(1\)\(3\)\(C\)](#). Reading the statutes separately would result in the absurdity that an out-of-state resident who transports into Illinois a firearm legally registered in his home state would be exempt from misdemeanor prosecution under the FOID Card Act, but could be prosecuted as a felon under the aggravated UUW statute.

Defendant was charged with aggravated UUI for failing to have a FOID card. Because the non-resident exception of the FOID Card Act is incorporated into the UUI statute, the trial court erred in excluding, as irrelevant, evidence that defendant had a valid gun permit from Indiana, the state of his residence. Defendant did not need to have the Indiana permit in his possession at the time of his arrest in order to claim the exemption, because the aggravated UUI statute requires only that defendant have been issued a currently valid FOID card.

(Defendant was represented by Assistant Defender Kristine Neal, Chicago.)

People v. Mosley, 2015 IL 115872 (No. 115872, 2/20/15)

To convict a defendant of aggravated unlawful use of a weapon, the State must prove beyond a reasonable doubt that the defendant was either carrying a firearm on his person or in his vehicle ([720 ILCS 5/24-1.6\(a\)\(1\)](#)) or was carrying or possessing a firearm while on a public way ([720 ILCS 5/24-1.6\(a\)\(2\)](#)), and that one of the factors set forth in subsection (a)(3) exists. Defendant was charged with three factors here: (1) the firearm was uncased, loaded and immediately accessible ((a)(3)(A)), (2) defendant had not been issued a valid FOID card ((a)(3)(C)); and (3) the firearm was a handgun and defendant was under 21 and was not engaged in lawful activities under the Wildlife Code ((a)(3)(I)). Section 24-1.6(d) provides that AUUI is a Class 4 felony unless certain circumstances mandate a greater sentence.

1. The court concluded that under **Aguilar**, defendant's convictions for carrying an uncased, loaded firearm on his person and on a public way were unconstitutional. Therefore, the trial court properly vacated those convictions. However, the court rejected the argument that the FOID card and under 21 provisions were inseverable from the above offenses.

The issue of severability involves questions of statutory interpretation and legislative intent. Where a statute does not contain its own severability provision, the severability section of the Statute on Statutes is utilized. That statute provides that the invalidity of one provision of a statute does not affect other provisions which can be given effect without the invalid provision. ([5 ILCS 70/1.31](#)).

The Supreme Court concluded that removing the provision struck down by **Aguilar** does not undermine the remaining factors, which can be executed on their own. Because the FOID card and "under 21" restriction stand independently of the provision that was held unconstitutional in **Aguilar**, both provisions are severable.

2. When analyzing a Second Amendment challenge, the court applies a two-step process. First, the court conducts a textual and historical analysis to determine whether the challenged law imposes a burden on conduct that was understood to be within the scope of the Second Amendment's protection at the time of ratification. If the challenged law regulates activity which fell outside the scope of the Second Amendment right as it was understood at the relevant historical time, the regulated activity is categorically unprotected and is not subject to further Second Amendment review.

If the historical evidence is inconclusive or suggests that the regulated activity is protected, then the court must apply the appropriate level of scrutiny and inquire into the strength of the State's justification for regulating or restricting the activity.

The defense acknowledged that the possession of weapons by persons under the age of 18 falls outside the protection of the Second Amendment, but argued that the Second Amendment rights of persons between the ages of 18 and 21 are violated by subsections (a)(1), (a)(3)(C) and (a)(1), (a)(3)(I), which restrict the possession of weapons by persons under the age of 21.

The court concluded that there is no recognized right for minors to own and possess firearms, and that restrictions on the ability of minors to possess weapons have traditionally been interpreted as lasting until age 21. Thus, the possession of handguns by persons between 18 and 21 constitutes conduct that is outside the scope of Second Amendment protection.

The court also found that the FOID card requirement is a reasonable and legitimate regulation of the right to possess weapons.

3. The court rejected the argument that equal protection is violated by the distinction in subsections

(a)(3)(C) and (a)(3)(I) between persons who are over and under 21 years of age. The court rejected the argument that strict scrutiny applies and found that there is a rational basis for the distinction because: (1) the State has a legitimate interest in protecting the public and police from the possession and use of dangerous weapons, and (2) given the immaturity and impulsivity of youth, that interest is served by restricting the possession of weapons by persons under the age of 21.

4. The court declined to consider whether the FOID card provision violates due process as applied to persons between the age of 18 and 20, finding that the record was insufficient to support the argument. The court also noted that persons who are under 21 and who wish to obtain a FOID card may either obtain the consent of their parents or appeal to the Director of the State Police.

5. [720 ILCS 5/24-1.6\(d\)\(2\)](#) provides that where the defendant is 18 years of age or older and the factors listed in both (A) and (C) are present, a first conviction of AUUW is a Class 4 felony carrying a minimum sentence of one year. The court found that the mandatory sentence factor was unconstitutional because subsection (d)(2) incorporates the offense created by subsection (a)(3)(A), which was held to be unconstitutional in **Aguilar**. However, the court concluded that the provisions of the statute were severable from the impermissible mandatory minimum sentencing term of (d)(2), and that the remainder of the AUUW statute therefore remains in effect.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

People v. Schweih, 2015 IL 117789 (No. 117789, 12/3/15)

The court held that under its recent decision in **People v. Williams, 2015 IL 117470**, the offense of aggravated unlawful use of a weapon (AUUW) under [720 ILCS 5/24-1.6\(a\)\(1\),\(a\)\(3\)\(C\)](#) did not have the identical elements as the offense of violation of the Firearm Owners Identification Card Act (FOID Card Act) under [430 ILCS 65/2](#). Thus the penalty for AUUW, a Class 4 felony, was not disproportionate to the penalty for violating the FOID Card Act, a Class A misdemeanor.

The court reversed the judgment of the circuit court declaring this section of the AUUW statute unconstitutional.

People v. Williams, 2015 IL 117470 (No. 117470, 11/19/15)

Under the identical elements test of the proportionate penalties clause of the Illinois Constitution ([III. Const. 1970, art. I, § 11](#)), when different offenses contain identical elements but different sentences, the penalties are unconstitutionally disproportionate and the offense with the greater penalty cannot stand.

The court held that the offense of aggravated unlawful use of a weapon (AUUW) under [720 ILCS 5/24-1.6\(a\)\(1\),\(a\)\(3\)\(C\) and \(a\)\(2\), \(a\)\(3\)\(C\)](#) did not have the identical elements as the offense of violation of the Firearm Owners Identification Card Act (FOID Card Act) under [430 ILCS 65/2\(a\)\(1\)](#). Thus the penalty for AUUW, a Class 4 felony, was not disproportionate to the penalty for violating the FOID Card Act, a Class A misdemeanor.

A defendant violates section 2(a)(1) of the FOID Card Act by possessing a firearm without having a FOID card in his possession. A defendant violates section 24-1.6(a)(1), (a)(3)(C) of the AUUW statute by carrying a firearm outside the home without a valid FOID card. A defendant violates section 24-1.6(a)(2), (a)(3)(C) of the AUUW statute by carrying or possessing a firearm on any public way without a valid FOID card. The State must prove the additional location element to establish the offense of AUUW. By contrast, the FOID Card Act has no location element. A defendant can violate the FOID Card Act by possessing a firearm in his home, but such conduct would not be a violation of AUUW. The elements of the two offenses are thus not identical.

The court reversed the judgment of the circuit court declaring these sections of the AUUW statute unconstitutional and remanded the cause with directions to reinstate the charges against defendant.

Wilson v. County of Cook, 2012 IL 112026 (No. 112026, 4/5/12)

The Supreme Court reversed the trial court's dismissal of a challenge to the constitutionality of a

Cook County ordinance banning assault weapons, and remanded the cause for further proceedings.

1. The court concluded that the record was insufficient to conclude that a Second Amendment challenge to the ban could not succeed. The U.S. Supreme Court has held that the Second Amendment protects a law-abiding citizen's use of a handgun for self-defense in the home. (See [District of Columbia v. Heller](#), 554 U.S. 570 (2008) and [McDonald v. City of Chicago](#), 561 U.S. , 130 S. Ct. 3020, 177 L.Ed.2d 894 (2010)). However, the Second Amendment does not protect the right to keep and carry any weapon in any manner and for any purpose. In particular, the Second Amendment does not protect the possession of weapons that are not typically possessed by law-abiding citizens for lawful purposes such as self-defense. Furthermore, U.S. Supreme Court precedent allows for regulation of the possession of firearms by felons and the mentally ill, restrictions on firearms in places such as schools and government buildings, and laws imposing conditions on the commercial sale of firearms.

Because the ordinance in question is not an absolute ban on the possession of all firearms for self-defense, but instead covers only a particular subset of weapons which are capable of firing rapidly, delivering a large number of shots without reloading, and creating a high risk of collateral damage, the court found that it is impossible to determine on this record whether assault weapons fall within the scope of the Second Amendment. The court noted, however, that there is little evidence that assault weapons are used for self-defense by most citizens and that many of the same types of weapons have been banned for at least ten years by federal law and various state and municipal ordinances.

Because it cannot be ascertained on this record whether the possession of assault weapons is protected by the Second Amendment, the court remanded the cause for further proceedings, including the development of a complete record.

2. The court rejected the plaintiff's argument that the ordinance is void for vagueness and violates equal protection. The void for vagueness doctrine has two purposes: to provide persons of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited, and to provide reasonable standards for enforcement in order to prevent arbitrary and discriminatory enforcement.

The court concluded that the county ordinance is not unconstitutionally vague, noting that the plaintiff's argument demonstrated that there is little question as to the scope of the ordinance.

The court also rejected the argument that the ordinance violates equal protection, finding that when read in its entirety the ordinance does not arbitrarily differentiate between two owners with similar firearms.

In re Angel P., 2014 IL App (1st) 121749 (No. 1-12-1749, 6/27/14)

1. The minor was charged with four counts of aggravated unlawful use of a weapon ([720 ILCS 5/24-1.6\(a\)\(1\)\(3\), \(a\)\(3\)\(A\), \(a\)\(3\)\(C\), \(a\)\(3\)\(D\), \(a\)\(3\)\(I\)](#)) based on possessing a firearm, two counts of unlawful possession of a firearm ([720 ILCS 5/24-3.1\(a\)\(1\), \(2\)](#)) based on possessing the same weapon, and one count of possession of firearm ammunition without a FOID card ([430 ILCS 65/2\(a\)\(2\)](#)). The court concluded that only one of the six counts charging possession of a firearm could be the basis of a delinquency adjudication, because all of the counts were based on a single act of possessing a pistol.

However, the court concluded that the defendant could also be convicted of possession of firearm ammunition without a FOID card ([430 ILCS 65/2\(a\)\(2\)](#)) although the ammunition which the minor possessed was loaded in the pistol which formed the basis for the AUUW conviction. The court found that the unambiguous language of the FOID Card Act allows separate convictions for possession of both a firearm and the ammunition which it contains. In addition, the court cited [People v. Sotelo, 2012 IL App \(2nd\) 101046](#), where convictions were affirmed for the simultaneous possession without a FOID card of three firearms and a separate box of ammunition.

2. The court found that under [People v. Aguilar, 2013 IL 112116](#), the minor's adjudication based on possession of a firearm while not on one's own property must be vacated. However, the court concluded that **Aguilar** permits adjudications based on aggravated unlawful use of a weapon based on failing to have a FOID card, AUUW by a person who is under the age of 21 and not involved in lawful activities under the Wildlife Code, and AUUW based on a previous delinquency adjudication for an offense that would have

been a felony had it been committed by an adult.

Defendant's delinquency adjudication and disposition were affirmed.

In re S.M., 2014 IL App (3d) 140687 (No. 3-14-0687, 2/4/15)

1. Defendant was charged in juvenile court with unlawful possession of a concealable handgun by a person under 18 years of age. [720 ILCS 5/24-3.1\(a\)\(1\)](#). The State did not present any evidence establishing defendant's age, which was an element of the offense. During closing argument, defendant pointed out this failure, and in rebuttal the State asked the trial court to take judicial notice of the court record showing that the court's juvenile jurisdiction attached for minors under 18 years of age. The trial court agreed with the State, finding that as a matter of jurisdiction defendant was under 18, otherwise he would have been tried in adult court.

2. The Appellate Court reversed defendant's adjudication, holding that the State failed to prove defendant was under 18, an element of the offense, and that the trial court could not properly fill in that missing proof by taking judicial notice of defendant's age.

[Illinois Rule of Evidence 201](#) allows a trial court to take judicial notice of certain facts which are not subject to reasonable dispute, meaning they are generally known in the local population or are capable of accurate and ready determination by consulting sources of unquestioned accuracy. A court may take judicial notice of its own records, including the status of pleadings in a juvenile proceeding.

3. The State charged defendant in juvenile court, which has exclusive jurisdiction to adjudicate criminal offenses committed by minors under the age of 18, and defendant did not file a motion to dismiss the charges. But procedural silence regarding allegations in a charging document cannot be construed as a judicial admission to an element of the offense. The failure of defendant to contest specific allegations in the charge did not absolve the State of its obligation to prove the elements of an offense.

Additionally, defendant's age was not technically a jurisdictional requirement since juvenile court is simply a division of the circuit court. Defendant's silence with respect to jurisdiction thus did not constitute an admission that he was under 18 at the time of the offense.

4. The Appellate Court rejected the State's argument, made for the first time on appeal, that the trial court could fill in the State's missing proof by taking judicial notice of defendant's unsworn statement during arraignment that he was 16 years old. Not only was the statement unsworn, it was also self-incriminating, since defendant gave the answer in response to a direct question from the court about his age, an element of the offense. If this statement could be considered on appeal to provide the necessary proof of age, it would prevent defendant from any meaningful opportunity to challenge this element at trial, or to challenge the admission of his statement as violating his right against self-incrimination.

5. The Appellate Court also held that the trial court could not take judicial notice of an adjudicative fact without first reopening the evidentiary portion of the trial. Here, defendant pointed out the missing proof during its closing argument. The State was not entitled to have a "do-over" by asking the court in its rebuttal argument to supplement the completed evidence pursuant to judicial notice.

Defendant's conviction was reversed.

(Defendant was represented by Assistant Defender Lucas Walker, Ottawa.)

People v. Akins, 2014 IL App (1st) 093418-B (No. 1-09-3418, 6/17/14)

The Appellate Court reiterated precedent holding that aggravated unlawful use of weapon convictions based on possession of weapons without a FOID card ([720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(C\)](#)) or possession of weapons on a public way without a FOID card ([720 ILCS 5/24-1.6\(a\)\(2\), \(a\)\(3\)\(C\)](#)) do not violate the Second Amendment. Citing [People v. Henderson, 2013 IL App \(1st\) 113294](#), the court concluded that aggravated unlawful use of a weapon based upon the lack of a FOID card is severable from the offenses found unconstitutional in [People v. Aguilar, 2013 IL 112116](#), and does not unconstitutionally deny the right to bear arms to persons who are between 18 and 20 years old.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

[People v. Alicea, 2013 IL App \(1st\) 112602 \(No. 1-11-2602, 10/30/13\)](#)

To sustain a conviction for unlawful use of a weapon by a felon, the State is required to prove that defendant had knowing possession of the weapon and that he had a prior felony conviction. Possession of the weapon can be either actual or constructive. Where the defendant is not found in actual possession of the weapon, the State must prove constructive possession. Constructive possession is shown by evidence that defendant had knowledge of the presence of the weapon, and the immediate and exclusive control over the area where it was found.

In the course of executing a search warrant for drugs in an apartment, the police recovered guns in an armoire under men's clothing and under a mattress in the front bedroom. A U.S. Treasury check addressed to defendant dated a day prior to the search was found in that same bedroom. One of defendant's sons and a young child were present when the warrant was executed. The son, who had been recently released from jail, told the police that he was there with his child to visit the child's grandfather, and was staying in the apartment only for a few days until he found another place to live.

Defendant's daughter testified that defendant had lived in the apartment with her, but at the time of the search lived with his girlfriend. The daughter lived in the apartment with her daughter and her two brothers. A photograph of the bathroom taken at the time of the search depicting three toothbrushes and a woman's sanitary products corroborated her testimony. The daughter testified that defendant's Veteran's Administration check still came to the apartment, and she would take it to defendant for his signature and deposit it. Defendant's girlfriend also testified that defendant lived with her. Defendant had used the apartment's address two months prior on his application for a driver's license, and he ran a business with cars on the street outside the apartment with his daughter.

The Appellate Court concluded that while the evidence tying defendant to the apartment was sufficient to support an inference that he lived there, it was not sufficient in the face of the other evidence to prove defendant's possession and control of the bedroom beyond a reasonable doubt. Although the trial judge had found the testimony of defendant's daughter and girlfriend incredible and confusing, the Appellate Court concluded that those characterizations were not borne out by its review of the record. It also believed it reasonable that defendant's son would not want to admit to the police that he was a resident of the apartment where guns and drugs were found. Because the State failed to prove that defendant constructively possessed the weapons, the court reversed defendant's convictions.

(Defendant was represented by Assistant Defender Grace Palacio, Chicago.)

[People v. Alvarado, 2011 IL App \(1st\) 082957 \(No. 1-08-2957, 12/30/11\)](#)

1. In [District of Columbia v. Heller, 545 U.S. 570 \(2000\)](#), the Supreme Court found that the Second Amendment was violated by a total ban on the possession of a handgun in the home for purposes of self-defense. **Heller** concluded, however, that the Second Amendment right to possess weapons is not unlimited and does not protect the right to possess weapons outside the home.

2. Citing Illinois appellate precedent, the court found that the Second Amendment is not violated by the aggravated unlawful use of a weapon statute ([720 ILCS 5/24-1.6\(a\)\(1\)\(a\)\(3\)\(C\)](#)), which bans carrying loaded firearms where the possessor is not on his or her land or in his or her home or fixed place of business and without having been issued a FOID card.

3. The court also rejected the argument that §24-1.6(a)(1)(a)(3)(I) of the AUUW statute violates the Second Amendment because it criminalizes the carrying of handguns for self-defense by 18, 19 and 20-year-old adults. The court found that the legislature intended to deter 18 to 20-year-old adults from carrying handguns because that age group is at a greater risk of gang activity and more likely to endanger juveniles. Applying the "intermediate" standard of review, court concluded that the statute serves a substantial important governmental interest and that there is a reasonable fit between the challenged provision and the goal in question.

The court rejected the argument that the "strict scrutiny" standard of review should apply, finding that the right to carry weapons in public is not at the core of the Second Amendment right, which concerns

the right to possess weapons within the home.

4. The court rejected the argument that §24-1.6(a)(1)(a)(3)(I) violates equal protection in that it prohibits only adults who are 18, 19, and 20 from exercising the constitutional right to bear arms.

The equal protection clause requires that the government treat similarly situated persons in a similar manner. The right to equal protection does not preclude the State from drawing distinctions between different categories of people, but merely prohibits different treatment of persons who have been placed into separate classes on the basis of criteria that are wholly unrelated to the purpose of the legislation.

Equal protection challenges are resolved under one of three standards. “Strict scrutiny” applies where a statute implicates a fundamental right or discriminates based upon a suspect class such as race or national origin. Where strict scrutiny applies, a statute will be upheld only if it is narrowly tailored to serve a compelling State interest. Classifications based on age are not “suspect.”

A statute that does not involve a fundamental constitutional right or a suspect classification is subject to one of the two other tests. First, the “rational basis” test requires only that the statute bear a rational relationship to the legislative purpose for which it was enacted. Second, the “intermediate scrutiny” test, which lies between “rational basis” and “strict scrutiny” review, applies to classifications based on gender or illegitimacy or which may cause content-neutral, incidental burdens to the constitutional right in question.

Because the AUUW statute does not infringe on the core of the Second Amendment – the right to possess a handgun in the home for self-defense purposes – the appropriate standard is either intermediate scrutiny or the rational basis test. The court concluded that for equal protection purposes, the AUUW statute satisfies the intermediate scrutiny and rational basis tests for the same reasons that it satisfies the intermediate scrutiny test for purposes of a Second Amendment challenge.

(Defendant was represented by Assistant Defender Douglas Hoff, Chicago.)

People v. Anthony, 408 Ill.App.3d 799, 951 N.E.2d 507 (1st Dist. 2011)

1. As a matter of first impression, the Appellate Court held that the plain language of the current version of [720 ILCS 5/24-1.1\(e\)](#) permits multiple convictions for unlawful use of a weapon by a felon where the defendant possesses a loaded weapon. Defendant’s convictions for possession of the weapon and possession of the ammunition in the clip were affirmed.

Although [People v. Carter, 213 Ill.2d 295, 821 N.E.2d 233 \(2004\)](#), held that the simultaneous possession of a firearm and ammunition gives rise to only one offense, the court noted that the legislature subsequently amended the unlawful possession of a weapon by a felon statute to provide that “[t]he possession of each firearm or firearm ammunition in violation of this Section constitutes a single and separate violation.” ([720 ILCS 5/24-1.1\(e\)](#)).

2. In dissent, Justice Gordon concluded that only one conviction of unlawful possession of a weapon by a felon may be entered for possession of a single loaded firearm. Justice Gordon concluded that the amendment in response to **Carter** did not resolve whether multiple convictions can be entered for the possession of a loaded firearm, and that under the majority’s analysis there would be an absurd result because separate convictions could be ordered for the possession of the firearm and for each round of ammunition in the clip. Justice Gordon concluded that the amendment was ambiguous on this point and should be interpreted to permit only a single conviction for possession of a loaded firearm.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Burns, 2013 IL App (1st) 120929 (No. 1-12-0929, 12/31/13)

Defendant was convicted of aggravated unlawful use of a weapon (AUUW) and was subject to a Class 2 sentence based on a prior felony conviction. The issue on appeal in this case was whether the Class 2 form of AUUW violates the second amendment.

A person commits AUUW under section (a)(1),(a)(3)(A) when he carries a firearm on his person or in a vehicle (unless he is on his land, abode, legal dwelling, or fixed place of business) and the firearm was uncased, loaded, and immediately accessible. ([720 ILCS 5/24-1.6\(a\)\(1\),\(a\)\(3\)\(A\)](#)). Under the sentencing

provisions of subsection (d), AUUW is a Class 4 felony except when there has been a previous conviction for AUUW in which case it is a Class 2 felony.

In [People v. Aguilar, 2013 IL 112116 \(12/19/13\)](#), the Illinois Supreme Court held that the Class 4 form of AUUW was facially unconstitutional because it violated the second amendment. A statute that is facially unconstitutional is void *ab initio*, meaning it is constitutionally infirm from the moment of its enactment and is therefore unenforceable. Here, defendant argued that under **Aguilar** his AUUW conviction was based on a facially unconstitutional statute and must be reversed. The State argued that **Aguilar** does not apply to convicted felons such as defendant who are sentenced to a Class 2 felony. Instead, **Aguilar** only applies to the Class 4 form of AUUW.

In general, where a statute initially sets forth the elements of the offense, then separately provides sentencing classifications based on other factors, these factors only enhance the punishments and do not create a new offense. **Aguilar**, however, as modified on denial of rehearing, specified that its holding was limited to the Class 4 form of AUUW. The modified decision left open the issue of whether any other section or subsection of the AUUW statute was unconstitutional. Furthermore, Justice Thies commented in her dissent from denial of rehearing that the Class 2 form of AUUW could be enforceable. Given the nature of the ruling in [Aguilar](#), including Justice Thies' comment, the Appellate Court agreed that the Class 2 form of AUUW might be enforceable.

Aguilar observed that the right to keep and bear arms is subject to regulation, including prohibiting felons from possessing firearms. The United States Supreme Court has described such regulations as presumptively reliable. [District of Columbia v. Heller, 554 U.S. 570 \(2008\)](#). And the Illinois Supreme Court in [Aguilar](#) affirmed the defendant's conviction for unlawful possession of a firearm by a minor, further indicating that the possession of firearms is subject to regulations and restrictions. The Appellate Court therefore concluded that possession of firearms by felons is conduct that falls outside the scope of the second amendment and rejected defendant's challenge to the Class 2 form of AUUW.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

[People v. Campbell, 2013 IL App \(4th\) 120635 \(No. 4-12-0635, 12/24/13\)](#)

Defendant was convicted of multiple counts of aggravated battery and aggravated unlawful use of a weapon, and was sentenced to concurrent terms of five years imprisonment on one count of aggravated battery and on aggravated unlawful use of a weapon under [720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(A\)](#). Defendant appealed.

1. The Appellate Court found that the aggravated unlawful use of a weapon conviction was void because in [People v. Aguilar, 2013 IL 112116](#), the Supreme Court found that the Second Amendment is violated by the provision of the statute on which defendant was convicted. The court rejected the State's argument that because defendant was a convicted felon and **Aguilar** did not invalidate long-standing prohibitions of possession of firearms by felons, the conviction could be affirmed. The court stated:

The State seems to misunderstand the nature of the Supreme Court's decision in [Aguilar](#). The court . . . did not merely hold that section 24-1.6(a)(1), (a)(3)(A) . . . was unconstitutional as applied in that case - the court held that the statute was unconstitutional *on its face*. . . . A statute is facially unconstitutional if there are no circumstances in which it could be validly applied. . . . [N]either defendant's status as a felon nor any other factor could render his conviction under that provision of the aggravated unlawful use of a weapon statute constitutional.

Furthermore, a conviction based on defendant's status as a felon would be improper where the jury was not instructed to find whether defendant was a felon and its verdict did not reflect such a finding.

2. The court also noted that the State did not charge defendant under [720 ILCS 5/24-1.1](#), which generally prohibits felons from possessing firearms. Instead, the State charged only that defendant had violated 5/24-1.6(a)(1), (a)(3)(A), which has no specific provision relating to possession of a weapon by a

felon.

Because defendant's aggravated unlawful use of a weapon conviction rested on a statutory provision which has been declared unconstitutional on its face, that conviction was void and must be reversed. Because the jury also found defendant guilty of aggravated unlawful use of a weapon under §24-1.6(a)(1), (a)(3)(C), which involves possession of a firearm without a valid FOID card, the cause was remanded with directions to enter judgment and sentence on that count.

(Defendant was represented by Assistant Defender Janieen Terrance, Springfield.)

People v. Campbell, 2014 IL App (1st) 112926 (1-11-2926, 4/23/14)

The court reiterated precedent holding that neither the armed habitual criminal statute ([720 ILCS 5/24-1.7\(a\)](#)) nor the unlawful use of weapon by a felon statute (720 ILCS 5/24.1.1(a)) violate the Second Amendment where the defendant possessed ammunition and a firearm in his home after having been convicted of a felony. The Second Amendment permits reasonable regulation of the use and possession of firearms by felons, and no reviewing court in any jurisdiction has found that the Constitution is violated by a statute prohibiting felons from possessing firearms or ammunition in his or her home.

(Defendant was represented by Assistant Defender Rob Markfield, Chicago.)

People v. Coleman, 409 Ill.App.3d 869, 948 N.E.2d 795 (1st Dist. 2011)

The court adopted recent precedent holding that the Armed Habitual Criminal Statute does not violate the Second Amendment by criminalizing the mere possession of a firearm by certain individuals. The court adopted the reasoning of **People v. Ross**, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-1463, 3/11/11), which concluded that the United States Supreme Court decisions in **District of Columbia v. Heller**, 554 U.S. 570, ___ S.Ct. ___, ___ L.Ed.2d ___ (2008) and **McDonald v. City of Chicago**, ___ U.S. ___, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) did not recognize a Second Amendment right for a convicted felon to possess a handgun, either in or outside of the home.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

People v. Daniels, 2016 IL App (1st) 142130 (No. 1-14-2130, 6/20/16)

Defendant pled guilty to aggravated unlawful use of a weapon. 720 ILCS 5/24-1.6(a)(1)(3)(B). After serving his sentence, defendant filed a 2-1401 petition challenging his conviction because it was based on a statute held facially unconstitutional in **Aguilar**, 2013 IL 112116. The trial court denied the petition.

On appeal, the State conceded that defendant's conviction should be vacated. The Appellate Court agreed. Although **Aguilar** only addressed subsection (3)(A), the underlying rationale extended to defendant's conviction under subsection (3)(B). Subsection (3)(A) prohibits the possession of an uncased firearm that is "loaded and immediately accessible," while subsection (3)(B) prohibits the possession of an uncased firearm that is "unloaded and the ammunition for the weapon is immediately accessible." Unless **Aguilar** applied to subsection (3)(B), the constitution would illogically prohibit the possession of an unloaded gun but not the possession of a loaded gun. **Aguilar** thus applies to subsection (3)(B).

Defendant's conviction was vacated.

(Defendant was represented by Assistant Defender Brian Carroll, Chicago.)

People v. Dawson, 403 Ill.App.3d 499, 934 N.E.2d 598 (1st Dist. 2010)

District of Columbia v. Heller, 554 U.S. ___, 128 S.Ct. 2783, ___ L.Ed.2d ___ (2008), held that the Second Amendment right to bear arms protects the right to possess a handgun in the home for self-defense purposes. In **McDonald v. City of Chicago**, ___ U.S. ___, 130 S.Ct. 3020, ___ L.Ed.2d ___ (2010), the Supreme Court held that the due process clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in **Heller**.

The Appellate Court upheld the constitutionality of the aggravated unlawful use of a weapons statute ([720 ILCS 5/24-1.6\(a\)\(1\)\(3\)\(A\)\(2006\)](#)) against a Second Amendment challenge in light of **Heller** and

McDonald. **Heller** and **McDonald** do not define the fundamental right to bear arms to include any activity barred by the statute as it excludes the possession of a firearm in one's own abode from its proscription.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

[People v. Deleon, 2015 IL App \(1st\) 131308 \(No. 1-13-1308, 5/28/15\)](#)

Defendant was convicted of unlawful sale or delivery of a firearm, which prohibits the delivery of a firearm, incidental to a sale, within 72 hours after "application for its purchase has been made." Application is defined as "when the buyer and seller reach an agreement to purchase a firearm." [720 ILCS 5/24-3\(A\)\(g\)](#).

The evidence showed that defendant acted as the straw purchaser of a firearm for his friend, Hill, at a store in Indiana. At Hill's request, defendant picked out the gun and paid for it with Hill's money. Four days later, defendant and Hill returned to Indiana, defendant picked up the gun and the gave it to Hill after they returned to Illinois.

The Appellate Court held that the State failed to prove defendant guilty beyond a reasonable doubt. The record contained no evidence that defendant and Hill reached an agreement to purchase the gun that would have triggered the 72 hour waiting period. Instead, the evidence showed that defendant and Hill reached an agreement for defendant to act a straw purchaser to obtain the gun for Hill. Since the agreement to provide services is not an agreement to purchase, the transfer of the gun from defendant to Hill did not trigger a waiting period.

Defendant's conviction was reversed.

(Defendant was represented by Assistant Defender Mike Gentithes, Chicago.)

[People v. Dunmore, 2013 IL App \(1st\) 121170 \(No. 1-12-1170, 12/24/13\)](#)

Defendant entered a negotiated guilty plea to an unlawful use of a weapon charge, and was sentenced to 18 months' probation and ordered to pay fines and fees. After his probation was revoked for committing another offense, he was sentenced to two years in prison. Defendant had completed his sentence by the time of this appeal, and challenged only the revocation of probation and the assessment of fees and fines.

While the appeal was pending, the Supreme Court issued [People v. Aguilar, 2013 IL 112116](#), which held that the statute to which defendant pleaded guilty (5/24-1.6(a)(1), (a)(3)(A)) was unconstitutional on its face. The court rejected defendant's request that it leave the conviction intact and limit its consideration to the revocation of probation and payment of fees and fines.

Once **Aguilar** held that the section of the Criminal Code on which the plea rested was facially unconstitutional, the statute was rendered void *ab initio*. In addition, judicial decisions declaring a statute unconstitutional apply to cases pending on direct review. Because defendant's conviction was void and courts have an independent duty to vacate void orders, **Aguilar** required that the void conviction be vacated once it came before the court.

(Defendant was represented by Assistant Defender Jean Park, Chicago.)

[People v. Faulkner, 2015 IL App \(1st\) 132884 \(No. 1-13-2884, 8/31/15\)](#)

Reiterating its precedent, the Appellate Court held that a Class 4 felony conviction for aggravated unlawful use of a weapon cannot serve as the predicate offense for either armed habitual criminal or unlawful use of a weapon. The Class 4 felony offense of AUUW was held unconstitutional in [People v. Aguilar, 2013 IL 112116](#).

The court rejected the State's argument that where **Aguilar** had not yet been decided when the instant offense arose, the armed habitual criminal conviction should be affirmed. Where a statute is declared unconstitutional, it is void *ab initio*. Thus, a conviction obtained under the statute is also void and cannot be used as the predicate for another offense.

(Defendant was represented by Assistant Defender Maria Harrigan, Chicago.)

[People v. Fields, 2014 IL App \(1st\) 130209 \(No. 1-13-0209, 12/31/14\)](#)

1. Defendant was convicted of aggravated unlawful use of a weapon under [720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(I\)](#), which defines the offense as carrying a pistol, revolver, or other firearm on or about one's person or any vehicle or concealed on or about one's person except when on one's land or legal abode, "or on the land or in the legal dwelling of another person as an invitee with that person's permission." The court rejected defendant's argument that as part of its burden of proof the State was required to show that defendant was not an invitee of a resident of the apartment building in which he was arrested. The court concluded that the General Assembly intended to require the defense to bear the burden of proving by a preponderance of the evidence that a statutory exemption to the AUUW is present.

2. [720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(I\)](#), creates the offense of AUUW where a person who is under the age of 21 possesses a firearm under specified circumstances. In [People v. Aguilar, 2013 IL 112116](#), the Illinois Supreme Court found that the Class 4 form of AUUW violated the Second Amendment. Here, defendant argued that the blanket prohibition of firearm possession by a person under the age of 21 also violates the Second Amendment.

The court rejected this argument, finding that the limitation of possession of firearms by persons under the age of 21 has historical roots and does not affect conduct at the core of the Second Amendment. Applying the intermediate scrutiny test, the court concluded that the prohibition on handgun possession by persons under the age of 21 is reasonably related to the substantial governmental interests of limiting the possession of firearms by a subset of the general population which is likely to be less responsible and mature and deterring illegal activity by a group of citizens which is at risk for engaging in illegal, gang-related activity.

(Defendant was represented by Assistant Defender Tonya Reedy, Chicago.)

[People v. Gayfield, 2014 IL App \(4th\) 120216-B \(No. 4-12-0216, 7/8/14\)](#)

Defendant was convicted of aggravated unlawful use of a weapon under [720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(A\)](#) for carrying a firearm that was concealed, loaded, and immediately accessible. That offense is generally a Class 4 felony. However, because defendant had previously been convicted of a felony, the offense was enhanced to a Class 2 felony under [720 ILCS 5/24-1.6\(d\)\(3\)](#).

In [People v. Aguilar, 2013 IL 112116](#), the Illinois Supreme Court held that the Class 4 version of AUUW violates the Second Amendment because it categorically prohibits the possession and use of a firearm outside the home for purposes of self-defense. However, the **Aguilar** court expressed no opinion concerning the constitutionality of any other form of AUUW.

The Appellate Court found that the elements of AUUW as charged here and in [Aguilar](#) were that: (1) defendant carried a prohibited firearm in a prohibited area, and (2) the firearm was uncased, loaded, and immediately accessible. The court also concluded that [720 ILCS 5/24-1.6\(d\)\(3\)](#) is merely a sentence enhancement provision and that defendant's prior felony conviction was not an element of the offense.

Because the elements of Class 2 AUUW are identical to the elements of the Class 4 offense that was invalidated in [Aguilar](#), the court concluded that the Class 2 version of AUUW based on a prior felony conviction also violates the Second Amendment. The court noted, however, that other districts of the Appellate Court have disagreed and have concluded that the reasoning of **Aguilar** does not invalidate a conviction for the Class 2 version of AUUW based on a prior conviction.

The conviction for AUUW was vacated.

(Defendant was represented by Assistant Defender Kelly Weston, Springfield.)

[People v. Grant, 2014 IL App \(1st\) 100174-B \(No. 1-10-0174, 12/15/14\)](#)

1. In [People v. Aguilar, 2013 IL 112116](#), the Illinois Supreme Court held that the Second Amendment is violated by provisions of the aggravated unlawful use of a weapon statute which prohibit possession of a loaded or immediately accessible firearm outside the home. Citing its prior decisions, the Appellate Court held that **Aguilar** does not invalidate sections of the aggravated unlawful use of a weapon statute which prohibit carrying a firearm on one's own land, abode, or place of business if "the person

possessing the firearm has not been issued a currently valid [FOID] card” ([720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(C\)](#)), and carrying or possessing a firearm on a public street or land without having been issued a valid FOID card ([720 ILCS 5/24-1.6\(a\)\(2\), \(a\)\(3\)\(C\)](#)). See also [People v. Henderson, 2013 IL App \(1st\) 113294](#); [People v. Taylor, 2013 IL App \(1st\) 110166](#)). The court concluded that requiring a valid FOID card constitutes a meaningful and valid regulation of Second Amendment rights.

2. The court rejected the argument that there was insufficient evidence to establish that defendant had not been issued a currently valid FOID card. Defendant responded in the negative when asked by police whether he had a “current valid FOID card,” and he did not present a valid card to the officers. The court rejected defendant’s claim that his response to officers meant only that he did not have a FOID card on his person, finding that there was a reasonable basis to believe that no FOID card had been issued. The court also found that there was independent evidence to corroborate defendant’s statement because he at no time produced a valid FOID card or requested an opportunity to retrieve such a card, told officers he had purchased the handgun from a “crack head” rather than a licensed firearm dealer, and fled when he saw the police car.

3. The court rejected the argument that the proportionate penalties clause of the Illinois Constitution is violated because possession of a weapon without a valid FOID card is a Class 4 felony under the aggravated unlawful use of a weapon statute, but the misdemeanor offense of violating the FOID Card Act is composed of identical elements. The court found that because the elements of the offenses are not identical, no proportionate penalties violation occurred.

First, the misdemeanor offense occurs when a person acquires or possesses a firearm, while the AUUW offense specifies that the defendant must “carry” the weapon on his person or in a vehicle ((a)(1)) or while on public land ((a)(2)). Second, the AUUW statute excludes possession on one’s own land or fixed place of business, while the misdemeanor offense has no such exclusion. Third, the misdemeanor offense requires that defendant have the FOID card in his possession when he acquires or possesses a firearm, while the AUUW statute requires only that defendant has been issued a valid card and not that he have it in his possession.

(Defendant was represented by Assistant Defender Kerry Goettsch, Elgin.)

[People v. Henderson, 2013 IL App \(1st\) 113294 \(No. 1-11-3294, 12/17/13\)](#)

[People v. Aguilar, 2013 IL 112116](#) held that the aggravated unlawful use of a weapon offense defined in [720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(A\)](#) violates the Second Amendment because it imposes a categorical prohibition on the right to carry a firearm outside one’s home for the purpose of self-defense. Here, the court concluded that the statutory subsection at issue in [Aguilar](#) is severable from the portions of the statute creating the offense of aggravated unlawful use of a weapon based on possession of a firearm without a valid FOID card ([720 ILCS 5/24-1.6 \(a\)\(2\), \(a\)\(3\)\(C\)](#)).

1. Whether an unconstitutional portion of a statute can be severed from the rest of the statute involves a question of statutory construction, which requires ascertaining and giving effect to the intent of the legislature. Generally, an invalid portion of a statute may be severed if the remaining portions can be given effect in the absence of the invalid provision.

Severability is determined by a two-part inquiry. First, the court must determine whether the valid and invalid portions of the statute are essentially and inseparably connected in substance. Second, the court must determine whether the legislature would have enacted the valid portions without also enacting the invalid portions.

2. Under [720 ILCS 5/24-1.6](#), aggravated unlawful use of a weapon occurs when a weapon is possessed under specified circumstances and one of nine aggravating factors is present. [Aguilar](#) held one of those nine factors to be unconstitutional - carrying an uncased, loaded, and immediately accessible firearm while not on one’s own land or with the permission of the landowner. Section (a)(3)(C) involves a completely different aggravating factor - possessing a weapon without having been issued a valid FOID card. The court concluded that the aggravating factor held unconstitutional in [Aguilar](#) was not inseparably

connected to the FOID provision, and that the legislature would have enacted the latter provision even had it omitted the former. In reaching this conclusion, the court noted that reviewing courts are obligated to uphold the constitutionality of legislative enactments where possible, that the eight factors not involved in **Aguilar** are unrelated to the factor struck down in that case, and that neither the “completeness nor the executability” of the entire statute was undermined by the **Aguilar** decision. Under these circumstances, it can be concluded that the legislature did not intend for the statute to stand or fall as a whole.

In addition, although **Aguilar** and **Moore v. Madigan**, 702 F. 3d 933 (7th Cir. 2012) held that the Second Amendment protects the right to carry weapons outside one’s home for purposes of self-defense, both cases also note that Second Amendment rights are subject to reasonable regulation. The FOID requirement is such a reasonable regulation.

3. The court rejected the argument that the FOID provision is facially unconstitutional because persons under the age of 21 have a Second Amendment right to armed self-defense, but the FOID statute ([430 ILCS 65/4\(a\)\(2\)\(i\)](#)) bars persons under the age of 21 from owning firearms without parental permission and without any individualized determination of dangerousness. First, because the core of the Second Amendment does not include the right of an 18 to 20-year-old to possess a handgun in public for the purpose of self-defense, only intermediate scrutiny applied. Second, on the same day **Aguilar** was decided, the court issued **Coram v. State**, 2013 IL 113867, which decided whether persons with prior convictions for domestic battery can obtain a FOID card. Because the three separate opinions in **Coram** applied the FOID act without raising any questions concerning its constitutionality, the court concluded that **Coram** strongly supports the conclusion that the FOID Card Act is constitutional as applied to persons under the age of 21.

4. The court rejected the argument that the legislature’s passage of the new Firearm Concealed Carry Act, which took effect after the offense here, indicates that the previous aggravated unlawful use of a weapon statute is unconstitutional in its entirety. The court noted that the new Act did not repeal the version of the AUUW statute at issue here and in fact imposed additional restrictions on persons who wish to obtain permits to carry concealed weapons, including a minimum age of 21 and the requirement to obtain a FOID card.

Because defendant failed to show that the statute creating the offense of AUUW based on the failure to obtain a valid FOID card was unconstitutional, and defendant was convicted but not sentenced on that charge, the cause was remanded to the trial court for imposition of sentence on that count.

(Defendant was represented by Assistant Defender Peter Sgro, Chicago.)

People v. Irby, 2015 IL App (3rd) 130429 (No. 3-13-0429, 5/11/15)

Defendant was charged with aggravated unlawful use of a weapon for knowingly carrying an “uncased, loaded, and immediately accessible” firearm in a vehicle. [720 ILCS 5/24-1.6\(a\)\(1\), \(3\)\(A\)](#). The parties stipulated that officers searched the car of defendant’s girlfriend after a traffic violation and found a loaded handgun under the right rear passenger seat. The stipulation made no mention whether the firearm was cased. Although the vehicle belonged to defendant’s girlfriend and was parked, defendant was considered to be in control because he was seated in the driver’s seat.

The court concluded that the State’s burden of proof included showing that the weapon was uncased, and declined to infer that the weapon was uncased merely because the defense failed to present any evidence to the contrary. Defendant’s conviction was reversed.

(Defendant was represented by Assistant Defender Dimitri Golfis, Ottawa.)

People v. Larson, 2015 IL App (2d) 141154 (No. 2-14-1154, 9/23/15)

1. A defendant who commits possession of a firearm without a valid firearm owner’s identification (FOID) card ([430 ILCS 65/2\(a\)\(1\)](#)), is guilty of a Class A misdemeanor if he does not possess a currently valid FOID card “but is otherwise eligible” to obtain one. [430 ILCS 65/14\(b\)](#). He is guilty of a Class 3 felony if he does not possess a currently valid FOID card and “is not otherwise eligible” to obtain one. [430 ILCS 65/14\(c\)\(3\)](#). He is also guilty of a Class 3 felony if his FOID card is “revoked.” [430 ILCS 65/14\(c\)\(1\)](#).

2. An order of protection was entered against defendant with an expiration date of February 14, 2011.

As a result of the order of protection, the Illinois State police revoked defendant's FOID card. On February 14, 2011, officers discovered defendant in possession of firearm. On that date, the order of protection had expired, so defendant was eligible to obtain a new FOID card, but had not yet done so. Defendant was convicted of a Class 3 felony under section 14(c)(1) since his FOID card was revoked.

Defendant argued on appeal that because he was eligible to obtain a FOID card at the time the firearm was discovered, he should have been convicted of a Class A misdemeanor under section 14(b), failing to possess a FOID card but eligible to obtain one. Defendant argued that both section 14(b) and 14(c)(1) applied to his case, and thus under the rule of lenity, the more lenient interpretation of the statute should be used.

3. The Appellate Court rejected defendant's argument. The court held that using the proper tools of statutory construction, it was clear that section 14(c)(1) applied to defendant, not section 14(b). Since the statute was not ambiguous, the rule of lenity did not apply.

First, each provision of a statute must be interpreted in light of the statute as a whole, and the statute must be construed to avoid rendering specific language superfluous or meaningless. Using these canons of interpretation, the court determined that defendant's argument would improperly render the word "revoked" in section 14(c)(1) meaningless.

Section 14(b) provides for situations where a defendant has no FOID card but is eligible to obtain one. Section 14(c)(3) provides for situations where a defendant has no FOID card and is not eligible to obtain one. Under defendant's interpretation, the only salient consideration in determining whether the offense is a misdemeanor or a felony is whether defendant is eligible to obtain a FOID card. But if that were the case, then sections 14(b) and 14(c)(3) would be entirely dispositive of the outcome, and the "revoked" language of section 14(c)(1) would be rendered meaningless. Instead, the statute treats a revoked FOID card more seriously than a non-possessed FOID card and punishes the former more severely.

Second, a statutory provision that is particular and relates to only one subject prevails over a provision that is general and applies to cases generally. Section 14(b) applies to the general category of cases where a defendant does not possess a FOID card. Section 14(c)(1) by contrast applies to the narrower subset of cases where a FOID card has been revoked. Accordingly, section 14(c)(1) is controlling.

Defendant's conviction and sentence were affirmed.

People v. McFadden, 2014 IL App (1st) 102939 (No. 1-10-2939, 2/4/14)

1. As a matter of plain error, the court found that multiple convictions for unlawful use of a weapon by a felon were improper under the one-act, one-crime doctrine, which precludes multiple convictions based on precisely the same physical act or where one of the offenses is a lesser included offense of the other. For purposes of the doctrine, an "act" is any overt or outward manifestation which will support a different offense.

Defendant was convicted of three counts of armed robbery and two counts of unlawful use of a weapon by a felon arising from the commission of armed robberies against separate victims over a 24-hour-period. The UUW by a felon convictions involved defendant's possession of a single weapon during two of the three robberies.

Noting that the UUW by a felon statute criminalizes possession rather than use of a weapon, the court concluded that a "singular and continuous" act of possession occurring over a several-hour period constitutes a single act for purposes of the one-act, one crime doctrine. Because the legislature is presumed to not have intended absurd results, the court concluded that the legislative intent of the UUW by a felon statute was to permit only one conviction for the continuous possession of a firearm, even where that firearm is used in the commission of several offenses during a single chain of events. Otherwise, "a potentially infinite number of convictions" could occur because "the defendant possessed the firearm from hour to hour, minute to minute, nanosecond to nanosecond."

The court vacated one of defendant's convictions for unlawful use of a weapon by a felon.

2. In a supplemental brief filed after the State filed a petition for rehearing, defendant argued that

the remaining conviction for unlawful use of a weapon by a felon must be vacated because it was predicated on the Class 4 felony of aggravated unlawful use of a weapon ([720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(A\)\(d\)](#)), which has been declared void as a violation of the Second Amendment. ([People v. Aguilar, 2013 IL 112116](#)). The court concluded that because defendant's conviction for U UW by a felon was pending on direct appeal when **Aguilar** was decided, the **Aguilar** holding must be applied. Furthermore, a previous felony that has been determined to be unconstitutional "cannot now, nor can it ever, serve as a predicate offense for any charge."

Because defendant's remaining conviction for unlawful use of a weapon by a felon was predicated on an offense that is unconstitutional under **Aguilar**, the conviction was vacated.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

[People v. Moore, 2013 IL App \(1st\) 110793 \(No. 1-11-0793, 3/22/13\)](#)

Defendant, a previously convicted felon, was convicted of two counts of aggravated unlawful use of a weapon ([720 ILCS 5/24-1.6](#)) after police officers observed him discarding a weapon as they approached him on the street. Section 24-1.6 creates the offense of aggravated unlawful use of a weapon for certain instances of carrying a handgun outside one's home or property. The Appellate Court rejected the argument that the AUUW statute violates the Second Amendment to the United States Constitution.

1. In [District of Columbia v. Heller, 554 U.S. 570 \(2008\)](#), and [McDonald v. City of Chicago, 561 U.S. 130 S.Ct. 3020, L.Ed.2d \(2010\)](#), the United States Supreme Court found that possession of a handgun in the home for purposes of self-defense is protected by the Second Amendment to the United States Constitution. However, the Supreme Court has not ruled on whether the Second Amendment protects the right to carry a weapon in public areas outside the home.

2. In [Moore v. Madigan, 702 F.3d 933 \(7th Cir. 2012\)](#), the Seventh Circuit found that the Illinois aggravated unlawful use of a weapon statute is unconstitutional because it prohibits carrying a concealed weapon in public for purposes of self-defense. The Appellate Court held that the **Madigan** opinion is not binding on Illinois courts because there is a conflicting line of authority by Illinois courts and the United States Supreme Court has not yet ruled on the question. The court also noted that the issue is currently pending in the Illinois Supreme Court (see [People v. Aguilar, 408 Ill. App. 3d 136, 944 N.E.2d 816 \(1st Dist. 2011\)](#) (l/a granted 5/25/11 as No. 112116).

3. The court noted that the defendant has a prior felony conviction, and found that **Heller**, **McDonald**, and **Moore** do not hold that the Second Amendment right to keep and bear arms guarantees a felon's ability to own and possess a firearm.

(Defendant was represented by Assistant Defender Sean Collins - Stapleton, Chicago.)

[People v. Neely, 2013 IL App \(1st\) 120043 \(No. 1-12-0043, 11/12/13\)](#)

The court rejected defendant's argument that the statute creating the offense of unlawful use of a weapon by a felon ([720 ILCS 5/24-1.1](#)) violates the Second Amendment because it bans the possession and use of firearms for self-defense outside the home. The court noted that in [People v. Aguilar 2013 IL 112116](#), the Illinois Supreme Court recognized that the Second Amendment protects a citizen's right to keep and bear arms for self-defense. However, **Aguilar** also noted that the constitutional right to bear arms is not unlimited and may be subjected to meaningful regulation, including regulation to protect the State's valid interest in preventing felons from possessing firearms. The court concluded that the unlawful use of a weapon by a felon statute is such a reasonable regulation, and therefore is constitutional.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

[People v. Olivieri, 2016 IL App \(1st\) 152137 \(No. 1-15-2137, 8/2/16\)](#)

1. To establish reckless discharge of a firearm, the State must prove that the defendant discharged a firearm in a reckless manner which endangered the bodily safety of an individual. [720 ILCS 5/24-1.5\(a\)](#). A person acts recklessly by consciously disregarding a substantial and unjustifiable risk that circumstances exist or that a result will follow, and that disregard constitutes a gross deviation from the standard of care

that a reasonable person would exercise. An accident is not equated with recklessness.

2. The court concluded that the State failed to prove that defendant acted recklessly in discharging a firearm. Defendant had placed live rounds in his pistol when he went for a walk, and upon returning to his apartment attempted to unload the pistol but accidentally fired a round. The round went through the apartment wall and into an adjacent apartment.

The court noted that unlike precedent cited by the State, defendant was not intoxicated and was not threatening anyone. Instead, he was merely attempting to unload a pistol. Under these circumstances, defendant did not engage in any reckless conduct.

Because the element of recklessness was not proved beyond a reasonable doubt, defendant's conviction for reckless discharge of a firearm was reversed.

[People v. Pryor, 2013 IL App \(1st\) 121792 \(No. 1-12-1792, 12/27/13\)](#)

Under [725 ILCS 5/111-3\(c\)](#), when the State seeks an enhanced sentence based on a defendant's prior conviction it must specifically state its intention to do so in the charging instrument, and it must state the prior conviction that is the basis of the enhancement. Subsection (c) defines an enhanced sentence as a sentence which is increased by a prior conviction from one class of offense to a higher class.

Here, the State charged defendant with unlawful use of a weapon by a felon (UUWF) under [720 ILCS 5/24-1.1\(a\)](#). Under subsection (e) of the UUWF statute, the sentence for this offense is a Class 3 felony, but any second or subsequent violation is a Class 2 felony. The charging instrument alleged that defendant had a previous conviction for UUW under case number 07 CR 18901 in violation of section 24-1.1(a). The parties stipulated that defendant had a prior felony conviction under case number 07 CR 18901, but did not state what the prior conviction was for. The State did not introduce a certified copy of conviction. The presentence investigation report stated that defendant had been convicted of an offense under section 24-1. At sentencing, the State argued that the sentence should be enhanced due to "a prior gun conviction." The trial court agreed and imposed a Class 2 sentence on defendant.

On appeal, defendant argued that the State failed to provide him with notice of its intent to seek an enhanced sentence as required by section 111-3. The Appellate Court agreed, holding that the State sought an enhanced sentence due to a prior conviction and that the charging instrument failed to state the prosecutor's intention to seek an enhanced sentence. The court also held that the charging instrument failed to state the prior conviction which served as the basis of the enhancement since the charge only mentioned the case number of defendant's prior conviction.

The Appellate Court noted that in two prior cases, [People v. Easley, 2012 IL App \(1st\) 110023](#) and [People v. Whalum, 2012 IL App \(1st\) 110959](#), the court reached a similar result. The court declined to follow [People v. Nowells, 2013 IL App \(1st\) 113209](#), which held that section 111-3(c) does not apply when the prior conviction used to enhance the offense is an element of the offense. The court also distinguished **Nowells** because there the defendant had been placed on actual notice about the type and class of the prior offense being relied on by the State. The court noted that **Easley** is pending in the Illinois Supreme Court as No. 115581.

Although defendant forfeited this issue by failing to properly object at trial, the Appellate Court addressed the issue as plain error since the improper enhancement of the class of offense implicates a defendant's substantial rights. The court vacated defendant's sentence and remanded for resentencing.

Justice Palmer, dissenting, would have followed **Nowells** instead of **Easley** and **Whalum**.

(Defendant was represented by Assistant Defender Jim Morrissey, Chicago.)

[People v. Richardson, 2013 IL App \(2d\) 120119 \(No. 2-12-0119, 8/23/13\)](#)

1. As a matter of first impression, the court found that at a jury trial for unlawful possession of a weapon by a felon while wearing body armor, the trial judge properly admitted a police officer's lay opinion that a vest worn by the defendant qualified as "body armor." The officer testified that the vest had the same fit and style as the armored vest the officer wore every day. In addition, the officer removed the vest's inserts

and testified that they were intended to cover vital organs and protect such areas from bullets. Thus, the officer did not merely give an opinion that the vest was body armor, but demonstrated to the jury the basis for that conclusion.

2. The court rejected defendant's argument that because the vest was not submitted for scientific testing, it was impossible for the jury to conclude that it was not "fake body armor." The court found that the argument was based on pure speculation, as there was no evidence to support a conclusion that the body armor was fake. Furthermore, the officer removed plates from the vest and concluded that they were capable of stopping bullets. Finally, because the vest was admitted into evidence, the jury could draw its own conclusion about its nature.

Defendant's conviction for unlawful possession of a weapon by a felon wearing body armor was affirmed.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

[People v. Robinson, 2011 IL App \(1st\) 100078 \(No. 1-10-0078, 12/30/11\)](#)

1. Generally, constitutional challenges are addressed under either the "rational basis" or "strict scrutiny" test. In determining whether the unlawful use of a weapon by a felon statute ([720 ILCS 5/24-1.1\(a\)](#)) violates the Second Amendment by prohibiting a felon's possession of a weapon in the home, the court utilized the "intermediate scrutiny" standard of review, which requires the court to determine whether the statute in question serves a significant, substantial, or important governmental interest and if so, whether the "fit" between the regulation and the asserted interest is reasonable.

2. In [McDonald v. City of Chicago, 561 U.S. , 130 S.Ct. 3020, 177 L.Ed.2d 894 \(2010\)](#) and [District of Columbia v. Heller, 554 U.S. 570 \(2008\)](#), the U.S. Supreme Court found that the Second Amendment protects the right to possess weapons within one's home for the purpose of self-defense. In both opinions, however, the court specifically noted that states may prohibit the possession of firearms by felons.

The Appellate Court concluded that the unlawful use of a weapon by a felon statute ([720 ILCS 5/24-1.1\(a\)](#)) is not unconstitutional on its face because it prohibits possession of a weapon by a felon within the felon's home. The court found that the statute constitutes a valid exercise of the government's right to protect the health, safety and general welfare of its citizens, serves a substantial governmental interest, and is proportionate to the interest served.

3. Furthermore, the court rejected the argument that [§5/24-1.1\(a\)](#) is unconstitutional as applied because the State failed to show that defendant's possession of a handgun in his home was for an unlawful purpose. The court concluded that the legislature acted within its broad power to protect citizens by prohibiting the possession of a weapon by persons convicted of felonies. The court concluded that the legislature acted within its broad power to protect citizens by prohibiting any possession of a weapon by persons convicted of felonies, without limiting the prohibition to felons whose possession of weapons is for an unlawful purpose.

(Defendant was represented by Assistant Defender Deborah Nall, Chicago.)

[People v. Shreffler, 2015 IL App \(4th\) 130718 \(4-13-0718, 8/4/15\)](#)

Unlawful use of weapons is committed by selling, manufacturing, purchasing, possessing or carrying a rifle with a barrel of less than 16 inches in length or any weapon made from a shotgun "if such a weapon as modified has an overall length of less than 26 inches." Defendant was convicted in a stipulated bench trial of three counts of unlawful use of weapons for possessing two illegal shotguns and one illegal rifle. The Appellate Court held that the evidence was insufficient to sustain the convictions.

1. The court acknowledged that there are two methods of measuring the length of a shotgun. The first, which is recognized by the Bureau of Alcohol, Tobacco and Firearms, requires that the measurement be based on a straight line that is parallel to the bore of the weapon. The second method, which ATF does not approve, determines the overall length by measuring a straight line between the two farthest points of the

weapon, which typically will not be parallel to the bore. The method approved by ATF results in a slightly smaller measurement than the alternative method.

Here, the ATF-approved measurement indicated that defendant's shotguns were 25¼ inches and 25⅝ inches respectively. However, the non-ATF method would have resulted in both shotguns having overall lengths greater than 26 inches.

The court concluded that had the General Assembly wanted to require use of the ATF-approved method it would have so specified in the statute. In the absence of any statutory direction, the term "overall length" is to be given its plain and ordinary meaning of the "longest" or "longer" dimension of the weapon. Because defendant's shotguns were greater than 26 inches when measured from the tip of the barrel to the most distant part of the stock, the evidence was insufficient to sustain the convictions based on possession of the shotguns.

2. The court also concluded that the evidence was insufficient to find that defendant possessed a rifle with a barrel that was less than 16 inches in length. It was undisputed that the barrel measured 11⅝ inches without the "screw on, screw off flash suppressor" that was attached, but would have exceeded 16 inches if the flash suppressor was included in the measurement.

The court noted that Illinois law does not specifically define the term "barrel" for purposes of the offense of unlawful use of a weapon, but the dictionary meaning of "barrel" is "the part of a gun that the bullets go through when the gun is fired." A bullet fired from the rifle in question would have traveled through the flash suppressor. In addition, because the statute is ambiguous, the rule of lenity requires that the statute be interpreted most favorably to the defendant. The court concluded that the flash suppressor should have been included in the measurement.

The court also noted that the General Assembly has not provided that pieces of a weapon that can be removed are to be excluded when determining the length of weapons. Finally, the evidence showed that defendant had not removed the flash suppressor from the rifle at any point during his ownership.

Defendant's convictions were reversed.

(Defendant was represented by Assistant Defender Tonya Joy Reedy, Chicago.)

[People v. Sito, 2013 IL App \(1st\) 110707 \(No. 1-11-0707, 7/16/13\)](#)

A person commits the offense of unauthorized possession or storage of weapons when he possesses any knife with a blade of at least three inches in length in any building supported in whole or in part with public funds without prior written permission from the chief security officer for the building. [720 ILCS 5/21-6\(a\)](#); [720 ILCS 5/33A-1\(c\)\(2\)](#).

1. A knife has a blade of at least three inches if it measures at least three inches from hilt to the tip of the blade.

"Blade" is not defined by the Criminal Code, but should be given its plain and ordinary meaning. The dictionary defines "knife" as a cutting instrument consisting of a sharp blade fastened to a handle. "Blade" is defined as the cutting part of the implement or the flat-edged cutting part of a sharpened tool or weapon. Because a knife is composed of two components, what is not a handle is a blade. There is no distinction between the sharpened edge of a blade and its non-sharpened edge. The legislature was concerned with the entire portion of a knife that could penetrate a body after an initial incision was created by the sharpened edge.

2. Although the statute does not set forth a culpable mental state, the appropriate mental state for the offense is knowledge.

Unauthorized possession or storage of weapons is not an absolute liability offense. An offense is an absolute liability offense only if it is a misdemeanor not punishable by incarceration or a fine exceeding \$500, or the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described. [720 ILCS 5/4-9](#). Unauthorized possession or storage of weapons is a Class A misdemeanor punishable by incarceration. [720 ILCS 5/21-6\(a\)](#); [730 ILCS 5/5-8-3\(a\)\(1\)](#). Nowhere in the enactment of the statute did the legislature expressly indicate an intent to impose absolute liability.

Possession offenses typically require proof of knowing possession. A material element of every offense is a voluntary act and possession is a voluntary act only if the offender knowingly procures or receives the thing possessed. [720 ILCS 5/4-1](#); [720 ILCS 5/4-2](#). Therefore, knowledge is the proper mental state to be applied.

The trial judge erroneously struck the element of knowledge from the instructions submitted to the jury. Because this resulted in the jury essentially being instructed not to consider defendant's testimony that he was not aware that he had a knife, the error was not harmless beyond a reasonable doubt.

(Defendant was represented by former Assistant Defender Geoffrey Burkhart, Chicago.)

People v. Smith, 2016 IL App (2d) 130997 (No. 2-13-0997, 2/8/16)

At defendant's sentencing for armed robbery with a firearm, the trial court erred by considering as aggravation a prior conviction of aggravated unlawful use of a weapon under [720 ILCS 5/24-1.6\(a\)\(3\)\(A\)](#). The prior AUUW was a Class 2 felony due to defendant's prior convictions.

1. The court acknowledged that in [People v. Aguilar, 2013 IL 112116](#), the Supreme Court invalidated only the Class 4 version of aggravated unlawful use of a weapon. However, in [People v. Burns, 2015 IL 117387](#), the court reconsidered the issue and found that the statute is facially unconstitutional in its entirety. Thus, both the Class 2 and Class 4 versions of aggravated unlawful use of a weapon violate the constitution.

2. A sentencing court may not consider, as a factor in aggravation, a prior conviction that was based on a statute which was later declared unconstitutional. Because the prior aggravated unlawful use of a weapon conviction was based on the statute held unconstitutional in [Aguilar](#) and [Burns](#), defendant's sentence was vacated and the cause remanded for re-sentencing.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

People v. Smith, 2016 IL App (1st) 140496 (No. 1-14-0496, 2/24/16)

Defendant was convicted of Unlawful Use of a Weapon by a felon, which carries a Class 2 felony sentence when committed by a person who is not confined in a penal institution but who has been convicted of a forcible felony. [720 ILCS 5/24-1.1\(e\)](#). A "forcible felony" is defined as treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnapping, kidnapping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement, and "any other felony which involves the use or threat of physical force or violence against any individual." [720 ILCS 5/2-8](#). Defendant contended that his prior conviction for aggravated battery of a peace officer was not a forcible felony and therefore could not be used to enhance his conviction.

The court concluded that because in 1990 the legislature amended the definition of "forcible felony" to include only aggravated batteries resulting in great bodily harm or permanent disability or disfigurement, it did not intend that all aggravated batteries were included in the definition of "forcible felonies." Thus, where defendant's prior conviction of aggravated battery to a peace officer was based on aggravated battery causing bodily harm to a police officer and not on great bodily harm or permanent disability or disfigurement, it was not a forcible felony.

The court rejected the argument that aggravated battery of a peace officer is a forcible felony under the residual clause for felonies that are not specifically listed but which involve the use or threat of violence or force. The court concluded that the residual clause is limited to offenses that are not specifically listed in the statute.

Because the trial court erred by using the prior conviction to enhance the aggravated battery conviction to a Class 2 offense, the cause was remanded for re-sentencing on a Class 3 felony.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

People v. Sotelo, 2012 IL App (2d) 101046 (No. 2-10-1046, 3/29/12)

[430 ILCS 65/2\(a\)](#) defines the offenses of unlawful possession of a firearm and unlawful possession of ammunition:

- (a)(1) No person may acquire or possess any firearm, stun gun, or taser . . . without having in his possession a [FOID] card. . . .
- (2) No person may acquire or possess firearm ammunition within this State without having in his or her possession a [FOID] card.

1. Under [People v. King, 66 Ill. 2d 551, 363 N.E.2d 838 \(1977\)](#), multiple convictions are prohibited for offenses carved from a single physical act or, with regard to multiple acts, where one of the offenses is a lesser included offense of the other. However, **King** does not prohibit multiple convictions for the simultaneous possession of multiple firearms without an FOID card. Although the “singular act of failing to possess a FOID card could not sustain multiple convictions of an offense comprised *solely of that act*, failing to possess a FOID card may serve as a common element of multiple offenses that include additional physical acts - possession of different firearms, or of firearm ammunition.”

2. However, the court concluded that the General Assembly did not intend to authorize multiple convictions for the simultaneous possession of multiple weapons without an FOID card. In determining whether the legislature intended to permit multiple convictions, the court is required to determine the “allowable unit of prosecution” for [§65/2\(a\)](#). Where a statute is ambiguous as to the allowable unit of prosecution, the court “must adopt a construction which favors the defendant.”

In [People v. Carter, 213 Ill. 2d 295, 821 N.E.2d 233 \(2004\)](#), the Illinois Supreme Court concluded that a statute which prohibited the possession of “any firearm or any firearm ammunition” was ambiguous because it could be read as providing either that the possession of each firearm constituted a separate offense, or as providing that the simultaneous possession of multiple firearms and ammunition constitute only a single offense. Because the statute was ambiguous, the **Carter** court adopted an interpretation that favored the defendant and held that the simultaneous possession of multiple firearms and ammunition constituted only a single offense.

The court reached the same conclusion concerning [§65/2\(a\)\(1\)](#), which uses similar language to the statute in [Carter](#). Thus, because the legislature did not intend that the simultaneous possession of multiple firearms constitutes multiple violations of [§65/2\(a\)\(1\)](#), two of three of defendant’s convictions under (a)(1) must be vacated.

The court reached the opposite conclusion concerning the possession of ammunition, however. The court concluded that had the General Assembly intended the simultaneous possession of firearms and ammunition to constitute a single unit of prosecution, it would have placed the firearms and ammunition provisions in a single statute rather than in two separate subsections. The court concluded that the structure of §65(a) showed that the General Assembly intended to permit separate convictions for possession of firearms without a FOID card and possession of ammunition without a FOID card. Thus, defendant’s conviction for possession of ammunition was affirmed.

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

[People v. Spencer, 2012 IL App \(1st\) 102094 \(No. 1-10-2094, 2/6/12\)](#)

Reiterating recent precedent, the Appellate Court rejected the argument that the unlawful use of a weapon by a felon statute ([720 ILCS 5/24-1.1\(a\)](#)) violates the Second Amendment. The court noted that U.S. Supreme Court precedent provides that States do not act unconstitutionally by prohibiting the possession of firearms by felons.

The court also rejected the argument that [720 ILCS 5/24-1.1\(a\)](#) is unconstitutional because the prohibition against felons possessing weapons applies even where the convictions were for nonviolent felonies. Defendant failed to litigate the issue in the trial court; furthermore, the U.S. Supreme Court has not limited the States’ ability to prohibit possession of firearms by felons to persons with convictions for violent felonies.

People v. Taylor, 2012 IL App (1st) 110166 (No. 1-11-0166, 12/18/13)

In **People v. Aguilar, 2013 IL 112116**, the Illinois Supreme Court held that the aggravated UUW statute (**720 ILCS 5/24-1.6(a)(1), (a)(3)(A)**) violated the Second Amendment because it was a flat ban on carrying guns outside the home. But the court also held that the right to possess and use a firearm was not unlimited and is subject to meaningful regulations.

A different subsection of the statute prohibits the possession of firearms by persons who do not obtain a FOID card. **720 ILCS 5/24-1.6(a)(1), (a)(3)(C)**. This subsection is not a comprehensive ban on possession and carrying firearms. It only affects those who do not possess a FOID card.

Courts have not applied a consistent level of scrutiny to determine whether a restriction placed on the right to keep and bear a firearm is reasonable. The appellate court concluded that it need not determine which approach is correct, as the FOID card restriction is constitutional under any approach.

Under the strict scrutiny approach, the means employed by the legislature must be necessary to achieve a compelling state interest, and the statute must be narrowly tailored to accomplish this goal. The FOID card requirement seeks to protect the public from individuals carrying firearms who should not be permitted to do so. Requiring compliance with the FOID card requirement is the least restrictive way to meet this compelling state interest.

Under the “text, history, and tradition” approach, the court assesses whether a firearm law regulates activity falling outside the scope of the Second Amendment right as it was understood at the time of the amendment’s adoption. A state law restricting an individual’s Second Amendment right to bear arms may prevail when guns are forbidden to a class of persons who present a higher than average risk of misusing a gun. The FOID card requirement is such a law. It is the state’s method to prevent those who present a higher than average risk of misusing a gun (such as minors, felons, or the mentally ill) from legally carrying one in public places.

Therefore the FOID card requirement is not facially unconstitutional.

(Defendant was represented by Assistant Defender Karl Mundt, Chicago.)

People v. Ware, 2014 IL App (1st) 120485 (No. 1-12-0485, 3/14/14)

A notice of appeal confers jurisdiction on a reviewing court to consider only the judgments or parts thereof specified in the notice of appeal. Here, the Appellate Court found that because the notice of appeal was limited to defendant’s current conviction for armed robbery, the Court did not have jurisdiction to determine whether defendant’s previous convictions for aggravated unlawful use of a weapon (AUUW), introduced as aggravation at sentencing, were unconstitutional under **People v. Aguilar, 2013 IL 112116**.

Although the Illinois Supreme Court found that the Class 4 form of AUUW was void in **Aguilar**, that fact alone did not give the Appellate Court jurisdiction over defendant’s prior convictions. The Appellate Court is not vested with authority to consider the merits of a case simply because it involves a void judgment. If defendant wants to challenge his prior convictions he must file the appropriate pleadings.

Additionally, since **Aguilar** implied that the Class 2 form of AUUW remains in effect, it is not necessarily true that defendant’s prior AUUW convictions are void. The Court rejected defendant’s request for resentencing.

(Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

People v. Wiggins, 2016 IL App (1st) 153163 (No. 1-15-3163, 12/8/16)

Defendant, a resident of Texas, was convicted of two counts of aggravated unlawful use of a weapon for possessing a weapon in his car without a FOID card and possessing a firearm on his person without a FOID card. **430 ILCS 65/2(b)(10)** creates an exemption to the FOID card requirement for non-residents of Illinois “who are currently licensed or registered to possess a firearm in their resident state.” Defendant argued that the FOID card exemption applied because Texas allows its citizens to possess a weapon without obtaining a license and because defendant obtained a permit to possess a firearm while serving in the United States Army Reserves at Ft. Bliss, TX.

The court rejected defendant's arguments.

1. The court concluded that the FOID card exception applies only to residents of states which require their citizens to either obtain a license or register in order to possess a firearm. The court found that by passing the FOID Card Act, the legislature intended to establish a regulatory system for the possession of firearms. The legislature provided a FOID card exception for licensed nonresidents who complied with a mandatory licensing process in their home state because it presumed that such a licensing requirement would involve a vetting process which ensured that a gunowner satisfied certain safety or eligibility requirements. Similarly, the legislature could presume that a registration process would track the identity of gunowners and perhaps of the guns they acquired.

The legislature did not intend to create an exception for the residents of states which did not have a licensing or registration requirement which involved such a vetting process. Thus, the Texas statutory scheme permitting the carrying of weapons without any licensing or registration requirement does not qualify Texas residents for the FOID card exemption.

2. Similarly, defendant's military permit did not satisfy the requirements for the FOID card exception. Section 2(b)(10) refers to a licensing and registration process in the defendant's "resident state," not a regulatory process for possessing weapons on a military base. In addition, although the legislature created exemptions from the AUUW statute for armed forces members who are engaged in official duties, it did not choose to create such an exemption for military personnel who were not involved in official duties.

3. The court rejected the argument that the Illinois FOID card requirement violates the Second Amendment as applied to a resident of a state that does not have a state licensing requirement. Defendant raised both facial and "as applied" arguments that the ban on possession of firearms by out-of-state residents whose state did not have a licensing requirement amounted to a flat ban on possession of firearms in Illinois.

A two-step approach is applied when resolving Second Amendment challenges. First, the courts look to the text and history of the Second Amendment to determine whether the challenged law imposes a burden on conduct that was understood to be within the scope of the Second Amendment's protection at the time of ratification. If the historical evidence is inconclusive or suggests that the regulated activity is protected, the court applies "the appropriate level of means-end scrutiny" and examines the "strength of the government's justification for restricting or regulating the exercise of second amendment rights."

The court acknowledged that **Aguilar** recognizes a Second Amendment right to possess a firearm for self-defense outside the home. However, **Aguilar** also found that the right to possess a weapon is not unlimited and may be subjected to meaningful regulation. In [People v. Mosley, 2015 IL 115872](#), the Illinois Supreme Court found that the FOID card requirement of the AUUW statute is a meaningful and justifiable regulation of firearms possession.

Thus, under **Aguilar** and **Mosley**, the Second Amendment is not violated by a requirement that a person who wishes to possess a firearm in Illinois must obtain a FOID card. Similarly, the legislature did not violate the constitution by limiting the FOID card exemption for non-Illinois residents to persons who have undergone a similar licensing procedure in their own state.

Although defendant was ineligible for a FOID card because he was a Texas resident, and Texas does not have a licensing process for the mere possession of a weapon, the court noted that Texas does have licensing for carrying a concealed weapon that is substantially similar to the process in Illinois for obtaining a FOID card. Thus, defendant could have qualified to possess a weapon in Illinois by obtaining a Texas concealed carry permit. In view of a Texas resident's ability to qualify for the FOID card exception, the court rejected the "as applied" argument that the Second Amendment was violated by limiting the §2(b)(10) FOID card exception to residents of states which had a licensing requirement.

In addition, because defendant could qualify for the FOID exemption by obtaining a concealed carry exemption in Texas, there was at least one factual situation in which the statute could be constitutionally applied to a Texas resident. Therefore, the facial challenge must fail as well.

[People v. Williams, 2011 IL App \(1st\) 091667-B \(No. 1-09-1667-B, revised op. 12/15/11\)](#)

[720 ILCS 5/24-1.6\(a\)\(1\)](#) defines aggravated unlawful use of a weapon as carrying a concealed weapon when one of several aggravating circumstances is present. [720 ILCS 5/24-1.1](#) defines unlawful use of a weapon by a felon as the possession of a weapon or ammunition by a person who has been convicted of a felony. Defendant was convicted of aggravated unlawful use of a weapon and unlawful use of a weapon by a felon for possessing a loaded handgun on a public street.

The Appellate Court rejected the argument that [§§5/24-1.6\(a\)\(1\) and 5/24-1.1](#) violate the Second Amendment as interpreted by [McDonald v. City of Chicago](#), 561 U.S. ___, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), and [District of Columbia v. Heller](#), 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). **McDonald** and **Heller** hold only that the Second Amendment protects the right to possess handguns in the home for purposes of self-defense. In both decisions, the Supreme Court stated that the holdings do not implicate the ability of a State to restrict the possession of weapons outside the home or by convicted felons.

Because the right to possess a loaded handgun in the home for purposes of self-defense is not implicated by [§5/24-1.6\(a\)\(1\)](#) or by [§5/24-1.1](#), neither statute violates the Second Amendment.

(Defendant was represented by Assistant Defender Brian McNeil, Chicago.)

[Top](#)

§53-2

Felony Based on Prior Conviction

[Lewis v. U.S.](#), 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980) Defendant, who had been previously convicted of a felony in state court, was convicted under a federal statute prohibiting possession of a firearm by a person who has been convicted of a felony in federal or state court. The defendant challenged his conviction on the ground that the prior conviction had been obtained in the absence of counsel. However, the prior conviction had not been overturned. The Supreme Court affirmed the federal conviction. Although an uncounseled felony conviction cannot be used for certain purposes, it is not invalid for all purposes. Use of such a conviction as the basis for imposing a civil firearms disability (enforceable by a criminal sanction) is not improper. A convicted felon may challenge the validity of the prior conviction or otherwise remove his disability before obtaining a firearm, but may not collaterally attack the prior conviction through a subsequent federal prosecution.

[People v. Brown](#), 325 Ill.App.3d 733, 759 N.E.2d 582 (3d Dist. 2001) Where the name on a certified copy of conviction is identical to the defendant's name, the State may rely on a presumption that defendant is the person named in the certified copy. Under such circumstances, the admission of the certified copy establishes beyond a reasonable doubt that defendant is a convicted felon. If the presumption is not established, or is rebutted by the defense, the State must introduce additional evidence to prove that defendant is the person named on the certified copy. Where the prior conviction was in the name "John Brown," but defendant was charged as "John E. Brown," the absence of a middle initial on the certified copy defeated the presumption of identity. The court rejected the State's argument that a middle initial is irrelevant to the presumption of identity. Compare [People v. West](#), 298 Ill.App.3d 58, 697 N.E.2d 1216 (1st Dist. 1998) (where there is a discrepancy between the defendant's name and the name shown on the certified record of the prior conviction, but the certified copy includes a photograph of the person convicted of the prior offense, the trial court may compare the photograph with the defendant's appearance and determine that defendant is the person who was previously convicted).

[People v. Peete](#), 318 Ill.App.3d 961, 743 N.E.2d 689 (4th Dist. 2001) Adopting the reasoning of [Old Chief v. U.S.](#), 519 U.S. 172 (1997), the court held that the trial court should require the State to accept a defense offer to stipulate to a prior conviction that is an element of the crime charged. The court found that there is

an undue risk of unfair prejudice if the prior felony is proven before the jury. The court also noted that where the trial court accepts such a stipulation, the IPI instructions may need to be modified to remove reference to the specific felony in question.

[People v. Harris, 343 Ill.App.3d 1014, 798 N.E.2d 1259 \(4th Dist. 2003\)](#) Under [People v. Peete, 318 Ill.App.3d 961, 743 N.E.2d 689 \(4th Dist. 2001\)](#) and [People v. Walker, 335 Ill.App.3d 102, 779 N.E.2d 268 \(2d Dist. 2002\)](#) the trial court may not refuse a defendant's offer to stipulate to a prior conviction that is offered to prove his status as a felon. At defendant's jury trial for unlawful possession of a weapon by a felon, the trial court committed plain error by refusing to accept an offer to stipulate to defendant's four prior felony convictions.

[People v. Parker, 335 Ill.App.3d 474, 781 N.E.2d 1092 \(1st Dist. 2002\)](#) Without deciding whether in a close case the trial court abuses its discretion by permitting the State to show the nature of the prior conviction where the defendant is charged with unlawful use of a weapon by a felon the court held that at least where the evidence of defendant's knowing possession of a weapon is overwhelming and the trial court limits the jury's use of the prior conviction to the question of defendant's status as a felon, any risk that the nature of the prior felony conviction will prejudice the defendant is "so low as to be negligible." In light of the overwhelming evidence and the limiting instruction, the trial court did not abuse its discretion by permitting the State to show that defendant's prior conviction was for second degree murder.

[People v. Moton, 277 Ill.App.3d 1010, 661 N.E.2d 1176 \(3d Dist. 1996\)](#) In a stipulated bench trial, defendant was convicted of unlawful use of a weapon by a felon. Defendant was originally charged by indictment as "William Moton." However, several months later a new indictment was returned charging defendant as "William Moton a/k/a William B. Morton a/k/a William Morten." Both indictments charged that defendant was in possession of a handgun on a specified date and that he had previously been convicted of a felony for selling cocaine in Shelby County, Tennessee. At trial, the only evidence of a prior conviction was a certified copy of a Tennessee felony conviction against "William B. Morton." The prosecutor argued that a presumption of identity applied because the defense had not objected to the indictment's inclusion of the alias "William B. Morton." The Appellate Court reversed, holding that the evidence was insufficient to establish a prior conviction. A certified copy of a prior conviction gives rise to a rebuttable presumption of identity where the name on the certified record is the same as that of the defendant. However, the mere fact that an alias is included in the charging instrument does not give rise to the presumption of identity where the conviction lists only the alias and not defendant's actual name.

[People v. Gober, 146 Ill.App.3d 499, 496 N.E.2d 1226 \(4th Dist. 1986\)](#) The Court found that a previous conviction was not proven by defendant's statements to police that he had "just got out of the penitentiary for shooting someone," because those statements did not reveal the offense of which defendant had been convicted. Furthermore, a prior conviction was not proven beyond a reasonable doubt by a document from a Mississippi circuit court showing that a "Lester Gober" had been convicted of manslaughter in 1975 and sentenced to eighteen years. Although the document was signed by the judge presiding over the proceedings and certified as a true copy by the circuit clerk, a prior conviction can be proved only by the record or an authenticated copy showing the caption, return of indictment in open court by the grand jury, indictment and arraignment of the defendant, impaneling of the jury and final judgment of the court. Here, the document introduced by the State was merely a "certified" copy of a "docket entry" and not an "authenticated" copy of conviction.

[People v. Phillips, 150 Ill.App.3d 531, 502 N.E.2d 80 \(3d Dist. 1986\)](#) Defendant pleaded guilty to two UUI offenses, one that occurred in January and one that occurred in June. His probation sentences were subsequently revoked, and he was sentenced to 180 days imprisonment for the January offense and three

years imprisonment for the June offense. The second sentence was imposed under a section of the statute which provided that a "person convicted of a second or subsequent [UUW] violation . . . commits a Class 4 felony." The Court held that an enhanced penalty should not be imposed until the defendant "has had the opportunity to reform after being punished for his first conviction." Since this defendant committed both offenses before being convicted of either, he did not have an opportunity to reform. The sentence for the June offense was reduced.

Cumulative Digest Case Summaries §53-2

People v. McFadden, 2016 IL 117424 (No. 117424, 6/16/16)

A statute that is facially unconstitutional is void *ab initio*, meaning that it was constitutionally infirm from the moment of its enactment and is therefore unenforceable. A defendant may not be prosecuted under a criminal statute that is facially unconstitutional and must be allowed to vacate a judgment of conviction premised on that statute.

Defendant was convicted of unlawful use of a weapon by a felon (UUWF) based on possessing of a firearm after he had been convicted of aggravated unlawful use of a weapon (AUUW). The UUWF statute prohibits the possession of a firearm by any person who has been convicted of a felony. 720 ILCS 5/24-1.1(a).

Defendant pled guilty to AUUW in 2002. He pled guilty to UUWF in 2008. In 2013, the Illinois Supreme Court held that the portion of the AUUW statute under which defendant was convicted was facially unconstitutional. **Aguilar**, 2013 IL 112116. On direct appeal from his UUWF conviction, defendant argued that the State failed to prove an essential element of the offense since the predicate offense, AUUW, was based on a statute that was facially unconstitutional and void *ab initio*.

The Illinois Supreme Court rejected defendant's argument. The court held that the void *ab initio* doctrine would enable defendant to vacate his 2002 AUUW conviction by filing an appropriate pleading. But a conviction remains valid until a court with proper reviewing authority has declared otherwise. Although **Aguilar** may provide a basis for vacating defendant's AUUW conviction, it did not automatically overturn that conviction. Thus when defendant committed UUWF he had a valid felony conviction that made it unlawful for him to possess firearms.

Justices Kilbride and Burke in dissent would have held that a conviction based on a facially unconstitutional statute could never have been validly established or prosecuted and thus could not form the predicate felony for UUWF.

(Defendant was represented by Assistant Defender Pam Rubeo, Chicago.)

People v. Zimmerman, 239 Ill.2d 491, 942 N.E.2d 1228 (2010)

720 ILCS 5/24-1.6(a)(3)(D) creates the offense of aggravated unlawful use of a weapon for possession of a weapon by a person who has been adjudicated delinquent for an act which would have been a felony if committed by an adult. The court concluded that the plain language of §24-1.6 establishes that the prior juvenile adjudication is an element of aggravated unlawful use of a weapon, and not merely a factor enhancing the sentence for misdemeanor unlawful use of a weapon.

The court noted that §24-1.6 defines the offense of aggravated unlawful use of a weapon, and does not merely enhance the sentence for misdemeanor UUW, which is defined in a different section. The court also noted that §24-1.6 contains eight other factors, all of which constitute elements of the offense, and that it would have been illogical for the General Assembly to include one sentence enhancing factor.

Because the prior juvenile adjudication was an element of the offense, 725 ILCS 5/111-3(c) does not apply. (Section 111-3(c) states that the charge must include a prior conviction used to enhance the sentence for an offense, but the prior conviction is not to be disclosed to the jury.) Thus, the trial court did not err by informing the jury of a stipulation that defendant had a prior juvenile adjudication which satisfied the

requirement of the offense.

(Defendant was represented by Deputy Defender Pete Carusona, Ottawa.)

In re Angel P., 2014 IL App (1st) 121749 (No. 1-12-1749, 6/27/14)

1. The minor was charged with four counts of aggravated unlawful use of a weapon ([720 ILCS 5/24-1.6\(a\)\(1\)\(3\), \(a\)\(3\)\(A\), \(a\)\(3\)\(C\), \(a\)\(3\)\(D\), \(a\)\(3\)\(I\)](#)) based on possessing a firearm, two counts of unlawful possession of a firearm ([720 ILCS 5/24-3.1\(a\)\(1\), \(2\)](#)) based on possessing the same weapon, and one count of possession of firearm ammunition without a FOID card ([430 ILCS 65/2\(a\)\(2\)](#)). The court concluded that only one of the six counts charging possession of a firearm could be the basis of a delinquency adjudication, because all of the counts were based on a single act of possessing a pistol.

However, the court concluded that the defendant could also be convicted of possession of firearm ammunition without a FOID card ([430 ILCS 65/2\(a\)\(2\)](#)) although the ammunition which the minor possessed was loaded in the pistol which formed the basis for the AUUW conviction. The court found that the unambiguous language of the FOID Card Act allows separate convictions for possession of both a firearm and the ammunition which it contains. In addition, the court cited [People v. Sotelo, 2012 IL App \(2nd\) 101046](#), where convictions were affirmed for the simultaneous possession without a FOID card of three firearms and a separate box of ammunition.

2. The court found that under [People v. Aguilar, 2013 IL 112116](#), the minor's adjudication based on possession of a firearm while not on one's own property must be vacated. However, the court concluded that [Aguilar](#) permits adjudications based on aggravated unlawful use of a weapon based on failing to have a FOID card, AUUW by a person who is under the age of 21 and not involved in lawful activities under the Wildlife Code, and AUUW based on a previous delinquency adjudication for an offense that would have been a felony had it been committed by an adult.

Defendant's delinquency adjudication and disposition were affirmed.

People v. Campbell, 2014 IL App (1st) 112926 (1-11-2926, 4/23/14)

The court reiterated precedent holding that neither the armed habitual criminal statute ([720 ILCS 5/24-1.7\(a\)](#)) nor the unlawful use of weapon by a felon statute ([720 ILCS 5/24.1.1\(a\)](#)) violate the Second Amendment where the defendant possessed ammunition and a firearm in his home after having been convicted of a felony. The Second Amendment permits reasonable regulation of the use and possession of firearms by felons, and no reviewing court in any jurisdiction has found that the Constitution is violated by a statute prohibiting felons from possessing firearms or ammunition in his or her home.

(Defendant was represented by Assistant Defender Rob Markfield, Chicago.)

People v. Claxton, 2014 IL App (1st) 132681 (No. 1-13-2681, 9/30/14)

A statute declared unconstitutional on its face is void *ab initio*, meaning it was constitutionally infirm from the moment of its enactment and is unenforceable. In [People v. Aguilar, 2013 IL 112116](#), the Illinois Supreme Court held that the Class 4 form of aggravated unlawful use of a weapon (AUUW) was facially unconstitutional.

Defendant was convicted of unlawful use of a weapon by a felon (UUWF) based on a prior felony conviction for the Class 4 form of AUUW that had been found facially unconstitutional in [Aguilar](#). The Appellate Court reversed defendant's conviction, holding that the State could not rely on a now-void conviction as a predicate offense for UUWF, and thus the State failed to prove an essential element of the offense.

The court rejected the State's argument that it lacked jurisdiction to review defendant's AUUW conviction. Defendant timely appealed his UUWF conviction and attacked that conviction based on the predicate felony being void *ab initio*. Since the prior AUUW conviction cannot serve as the elemental predicate felony for UUWF, the court had jurisdiction to reverse the UUWF conviction properly before it.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

[People v. Coleman, 409 Ill.App.3d 869, 948 N.E.2d 795 \(1st Dist. 2011\)](#)

The court adopted recent precedent holding that the Armed Habitual Criminal Statute does not violate the Second Amendment by criminalizing the mere possession of a firearm by certain individuals. The court adopted the reasoning of **People v. Ross**, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-1463, 3/11/11), which concluded that the United States Supreme Court decisions in **District of Columbia v. Heller**, 554 U.S. 570, ___ S.Ct. ___, ___ L.Ed.2d ___ (2008) and **McDonald v. City of Chicago**, ___ U.S. ___, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) did not recognize a Second Amendment right for a convicted felon to possess a handgun, either in or outside of the home.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

[People v. Davis, 405 Ill.App.3d 585, 940 N.E.2d 712 \(1st Dist. 2010\)](#)

1. The offense of armed habitual criminal prohibits the possession of a firearm by one who has been previously convicted of two or more qualifying offenses. [720 ILCS 5/24-1.7\(a\)](#). Making the specified prior convictions elements of the offense, rather than sentencing enhancements to be considered by the judge, does not violate due process merely because some prejudice may result to the defendant.

2. Where the defendant is willing to stipulate to the fact of his prior conviction, the court abuses its discretion in admitting the record of the prior conviction because the risk of unfair prejudice substantially outweighs the discounted value of the record of conviction. **Old Chief v. U.S.**, 519 U.S. 172 (1997). The armed habitual criminal statute requires that the State prove not just that defendant has a prior felony conviction, but that defendant had two or more specific qualifying felonies. Therefore, the reasoning of **Old Chief** does not support a due process challenge to the armed habitual criminal statute.

3. Supreme Court Rule 451(g) permits a bifurcated trial where the State provides notice pursuant to [725 ILCS 5/11-3\(c-5\)](#) that it intends to rely on a fact, other than the fact of a prior conviction, that is not an element of the offense to increase the range of penalties for an offense beyond the statutory maximum. This statute is inapplicable to armed habitual criminal because the prior convictions are elements of the offense and not sentencing enhancements. Due process does not require a bifurcated trial for armed habitual criminal.

(Defendant was represented by Assistant Defender Lindsey Anderson, Chicago.)

[People v. Faulkner, 2015 IL App \(1st\) 132884 \(No. 1-13-2884, 8/31/15\)](#)

Reiterating its precedent, the Appellate Court held that a Class 4 felony conviction for aggravated unlawful use of a weapon cannot serve as the predicate offense for either armed habitual criminal or unlawful use of a weapon. The Class 4 felony offense of AUUW was held unconstitutional in [People v. Aguilar, 2013 IL 112116](#).

The court rejected the State's argument that where **Aguilar** had not yet been decided when the instant offense arose, the armed habitual criminal conviction should be affirmed. Where a statute is declared unconstitutional, it is void *ab initio*. Thus, a conviction obtained under the statute is also void and cannot be used as the predicate for another offense.

(Defendant was represented by Assistant Defender Maria Harrigan, Chicago.)

[People v. Fields, 2014 IL App \(1st\) 110311 \(No. 1-11-0311, 2/11/14\)](#)

The court vacated defendant's armed habitual criminal (AHC) conviction since one of the two prior qualifying offenses necessary to prove AHC was the same Class 4 version of aggravated unlawful use of a weapon (AUUW) that was found to violate the Second Amendment in [People v. Aguilar, 2013 IL 112116](#).

A person commits AHC when he possesses a firearm after having been convicted of two qualifying offenses. [720 ILCS 5/24-1.7](#). The prior convictions are elements of the offense. One of the prior convictions the State charged and proved in this case was a Class 4 AUUW conviction. Since that offense is based on a statute found to be facially unconstitutional and hence void *ab initio* in [Aguilar](#), the State failed to prove an essential element of AHC. "A void conviction for the Class 4 form of AUUW found to be unconstitutional

in [Aguilar](#), cannot now, nor can it ever, serve as the predicate offense for any charge.” Accordingly, the AHC conviction was vacated.

(Defendant was represented by Assistant Defender Shawn O’Toole, Chicago.)

People v. Garvin, 2013 IL App (1st) 113095 (No. 1-11-3095, 8/7/13)

The Appellate Court upheld the unlawful use of weapons by a felon statute (UUWF), specifically its prohibition of possession of firearm ammunition by a felon, against a Second Amendment challenge. The UUWF statute does not regulate conduct that is constitutionally protected by the Second Amendment. The Second Amendment does not protect the right of felons to possess firearms, including firearm ammunition.

Even if the Second Amendment did protect the right of felons to possess firearm ammunition, the constitutional challenge fails under any level of scrutiny. The statute is a valid exercise of Illinois’s right to protect the health, safety, and general welfare of its citizens from the potential danger posed by convicted felons in possession of firearms or firearm ammunition.

(Defendant was represented by Assistant Defender Darrel Oman, Chicago.)

People v. Gayfield, 2014 IL App (4th) 120216-B (No. 4-12-0216, 7/8/14)

Defendant was convicted of aggravated unlawful use of a weapon under [720 ILCS 5/24-1.6 \(a\)\(1\), \(a\)\(3\)\(A\)](#) for carrying a firearm that was concealed, loaded, and immediately accessible. That offense is generally a Class 4 felony. However, because defendant had previously been convicted of a felony, the offense was enhanced to a Class 2 felony under [720 ILCS 5/24-1.6 \(d\)\(3\)](#).

In [People v. Aguilar, 2013 IL 112116](#), the Illinois Supreme Court held that the Class 4 version of AUUW violates the Second Amendment because it categorically prohibits the possession and use of a firearm outside the home for purposes of self-defense. However, the **Aguilar** court expressed no opinion concerning the constitutionality of any other form of AUUW.

The Appellate Court found that the elements of AUUW as charged here and in [Aguilar](#) were that: (1) defendant carried a prohibited firearm in a prohibited area, and (2) the firearm was uncased, loaded, and immediately accessible. The court also concluded that [720 ILCS 5/24-1.6 \(d\)\(3\)](#) is merely a sentence enhancement provision and that defendant’s prior felony conviction was not an element of the offense.

Because the elements of Class 2 AUUW are identical to the elements of the Class 4 offense that was invalidated in [Aguilar](#), the court concluded that the Class 2 version of AUUW based on a prior felony conviction also violates the Second Amendment. The court noted, however, that other districts of the Appellate Court have disagreed and have concluded that the reasoning of **Aguilar** does not invalidate a conviction for the Class 2 version of AUUW based on a prior conviction.

The conviction for AUUW was vacated.

(Defendant was represented by Assistant Defender Kelly Weston, Springfield.)

People v. Gibson, 403 Ill.App.3d 942, 934 N.E.2d 611 (2d Dist. 2010)

To prove the elements of unlawful possession of a weapon by a felon beyond a reasonable doubt, the person who possessed the weapon must be shown to be a convicted felon. Where an alleged accomplice had a prior felony conviction but there was no evidence that either of the principals had ever been convicted of a felony, the State failed to establish the offense beyond a reasonable doubt. The court reversed the alleged accomplice’s conviction for unlawful possession of a weapon by a felon.

(Defendant was represented by Assistant Defender Vicki Kouros, Elgin.)

People v. McFadden, 2014 IL App (1st) 102939 (No. 1-10-2939, 2/4/14)

1. As a matter of plain error, the court found that multiple convictions for unlawful use of a weapon by a felon were improper under the one-act, one-crime doctrine, which precludes multiple convictions based on precisely the same physical act or where one of the offenses is a lesser included offense of the other. For purposes of the doctrine, an “act” is any overt or outward manifestation which will support a different

offense.

Defendant was convicted of three counts of armed robbery and two counts of unlawful use of a weapon by a felon arising from the commission of armed robberies against separate victims over a 24-hour period. The UUW by a felon convictions involved defendant's possession of a single weapon during two of the three robberies.

Noting that the UUW by a felon statute criminalizes possession rather than use of a weapon, the court concluded that a "singular and continuous" act of possession occurring over a several-hour period constitutes a single act for purposes of the one-act, one crime doctrine. Because the legislature is presumed to not have intended absurd results, the court concluded that the legislative intent of the UUW by a felon statute was to permit only one conviction for the continuous possession of a firearm, even where that firearm is used in the commission of several offenses during a single chain of events. Otherwise, "a potentially infinite number of convictions" could occur because "the defendant possessed the firearm from hour to hour, minute to minute, nanosecond to nanosecond."

The court vacated one of defendant's convictions for unlawful use of a weapon by a felon.

2. In a supplemental brief filed after the State filed a petition for rehearing, defendant argued that the remaining conviction for unlawful use of a weapon by a felon must be vacated because it was predicated on the Class 4 felony of aggravated unlawful use of a weapon ([720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(A\)\(d\)](#)), which has been declared void as a violation of the Second Amendment. ([People v. Aguilar, 2013 IL 112116](#)). The court concluded that because defendant's conviction for UUW by a felon was pending on direct appeal when **Aguilar** was decided, the **Aguilar** holding must be applied. Furthermore, a previous felony that has been determined to be unconstitutional "cannot now, nor can it ever, serve as a predicate offense for any charge."

Because defendant's remaining conviction for unlawful use of a weapon by a felon was predicated on an offense that is unconstitutional under **Aguilar**, the conviction was vacated.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

[People v. McGee, 2016 IL App \(1st\) 141013 \(No. 1-14-1013, 2/16/16\)](#)

To convict a defendant of being an armed habitual criminal (AHC), the State must prove that defendant possessed a firearm after having two or more convictions for any qualifying offense, including various weapons offenses. [720 ILCS 5/24-1.7\(a\)](#). To convict a defendant of unlawful use of weapons by a felon (UUWF), the State must prove that defendant possessed a firearm after having any previous felony conviction. [720 ILCS 5/24-1.1\(a\)](#).

Defendant was convicted of AHC based on prior convictions for aggravated unlawful use of weapons (AUUW) in 2007 and several weapons offenses in 2008. Defendant was also convicted of UUWF based on the prior convictions for weapon offenses in 2008. The trial court merged the two convictions and sentenced defendant for AHC.

On appeal, defendant argued that his convictions were improper because the prior felony convictions were based on statutes that were declared facially unconstitutional in [People v. Aguilar, 2013 IL 112116](#) and [People v. Burns, 2015 IL 117387](#). The Appellate Court agreed that the AHC conviction was improper but found that the UUWF conviction was not.

The 2007 AUUW conviction was based on a portion of the AUUW statute that had been declared facially unconstitutional making it void ab initio. That particular AUUW conviction thus could not serve as one of the necessary predicate offenses for the AHC conviction. The AHC conviction was vacated.

In the 2008 case, however, defendant was convicted of multiple weapons offenses, including two counts of AUUW without a valid firearm owner's identification (FOID) card. The statute for that particular portion of AUUW was upheld in [People v. Mosley, 2015 IL 115872](#). Since defendant had a constitutionally valid qualifying felony in the 2008 case, the State proved all the elements of UUWF.

The court specifically held that the charging instrument did not need to identify the correct prior felony to properly charge and obtain a conviction for UUWF. All the charging instrument needed to allege was that defendant had a prior felony conviction. Here the State did not identify the form of AUUW that had

passed constitutional muster. Instead, it identified another offense that was unconstitutional. But the identity of the exact offense was mere surplusage, and thus unnecessary to properly charge and obtain a conviction for UUWF.

The court affirmed the UUWF conviction and remanded for sentencing on that offense.
(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

People v. McIntyre, 2011 IL App (2d) 100889 (No. 2-10-0889, 12/14/11)

1. To convict defendant under an accountability theory of unlawful possession of a weapon by a felon, the State must first establish a *prima facie* case against the principal. An essential element of that offense is that the principal is a convicted felon. Although defendant was a convicted felon, the principal was not. Because absent that evidence, the State failed to prove that the principal committed the offense of unlawful possession of a weapon by a felon, defendant could not be convicted of that offense under an accountability theory.

2. To prove that the defendant constructively possessed a weapon, the State had to establish that defendant had: (1) knowledge of the presence of the weapon, and (2) immediate and exclusive control over the area where the weapon was found. Knowledge of the presence of the weapon is not the equivalent of possession. Nor is proximity to the weapon sufficient to show possession. A defendant's status as the owner-driver of a car does not prove his possession of everything within the passenger area when there are passengers present who may possess the contraband. Possession may be held jointly by the owner-driver and other passengers, but the evidence must support the conclusion that the defendant had control, or the ability to exercise control, over the contraband.

Defendant had knowledge of the presence of the weapon when his passenger fired shots from the front passenger seat of defendant's car. But defendant, who was the owner-driver of the car, did not have control, or the ability to exercise control, over the weapon, where the police found the gun in an opening between the plastic base of the front-passenger seat and the leather portion of that seat, on the side of the seat closest to the front-passenger door.

The court reversed defendant's conviction for unlawful possession of a weapon by a felon.
(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

People v. Perkins, 2016 IL App (1st) 150889 (No. 1-15-0889, 8/31/16)

In **Mcfadden, 2016 IL 117424**, the Illinois Supreme Court held that a conviction that is based on a statute later declared facially unconstitutional remains valid until a court with proper reviewing authority has declared otherwise. In **Mcfadden**, the Supreme Court held that when defendant committed the offense of unlawful use of weapons by a felon (UUWF) he had a valid felony conviction that made it unlawful for him to possess firearms even though the prior felony was based on a facially unconstitutional statute.

Here defendant was convicted of being an armed habitual criminal (ACH) based in part on a prior weapons conviction that was premised on a facially unconstitutional statute. The Appellate Court could see no meaningful distinction between ACH and UUWF, and thus held that the **Mcfadden** controlled the outcome of this case.

(Defendant was represented by Assistant Defender Michael Gomez, Chicago.)

People v. Powell, 2012 IL App (1st) 102363 (No. 1-10-2363, modified on grant of rehearing 5/8/12)

1. The rule against double enhancement prohibits use of a single factor both as an element of an offense and as a basis for imposing a more harsh sentence. However, the rule does not apply where the legislature clearly expresses its intention to enhance the penalty based upon some aspect of the crime. The best indication that the legislature intended such an enhancement lies in the statutory language itself.

2. **720 ILCS 5/24-1.1(e)** provides that unlawful use of a weapon by a felon is a Class 3 felony with a sentence of two to 10 years if the prior conviction was for a non-forcible felony, but a Class 2 felony with a sentence of three to 14 years if the prior conviction was for a forcible felony. The court concluded that

[§5/24-1.1\(e\)](#) does not involve an enhancement of a Class 3 felony to a Class 2 felony based on the nature of the prior conviction. Instead, the legislature chose to define unlawful use of a weapon by a person who has been convicted of a forcible felony as a Class 2 felony. Thus, under the plain language of the statute there is no enhancement of a lesser offense due to the nature of the prior conviction.

3. The court also found that if [§5/24-1.1\(e\)](#) was found to involve an enhancement based on whether the prior conviction was for a forcible felony, the plain language of the statute demonstrates clear legislative intent to increase the class of the offense based on the fact that the prior conviction was for a forcible felony. Therefore, the rule against double enhancement would not be violated.

(Defendant was represented by Assistant Defender Emily Wood, Chicago.)

People v. Richardson, 2015 IL App (1st) 130203 (No. 1-13-0203, 8/10/15)

In **People v. Aguilar, 2013 IL 112116**, the Illinois Supreme Court held that Class 4 felony Aggravated Unlawful Use of a Weapon ([720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(A\), \(d\)](#)) violates the Second Amendment by prohibiting possession of an "uncased, loaded and immediately accessible" firearm outside the home. **Aguilar** found that the statutes creating the Class 4 felony offense of AUUW were facially unconstitutional.

Here, the Appellate Court reiterated precedent that Class 4 AUUW convictions are void *ab initio* and cannot be used as predicates for subsequent charges of Unlawful Use of a Weapon by a Felon. The court rejected the State's argument that a prosecution for the latter offense may proceed if the prior conviction became final before **Aguilar** was decided. Thus, defendant's conviction for unlawful use of a weapon by a felon, which preceded **Aguilar** by more than a year, was improper because defendant's status as a felon was based on a conviction that was void *ab initio*.

Defendant's conviction was reversed.

People v. Rush, 2014 IL App (1st) 123462 (No. 1-12-3462, 9/30/14)

1. The unlawful use of a weapon by a felon (UUWF) statute makes it unlawful for a convicted felon to possess a firearm. [720 ILCS 5/24-1.1\(a\)](#). The statute however does not apply to convicted felons who have been granted relief under the Firearm Owners Identification (FOID) Card Act. The FOID Card Act allows any felon, whose conviction is more than 20 years old, to apply to the Director of the Department of State Police or petition the circuit court requesting relief from the prohibitions of the UUWF statute. [430 ILCS 65/10\(c\)\(1\)](#).

As a convicted felon, defendant was prohibited from possessing a weapon and was ineligible for relief under the FOID Card Act since his conviction was less than 20 years old. Defendant argued that as applied to him this statutory scheme violated the Second Amendment and his right to due process and equal protection.

2. In deciding whether a statute violates the Second Amendment, courts should first determine whether the challenged law affects conduct within the scope of the Second Amendment. If the challenged law only applies to conduct outside the scope of the Second Amendment, then the regulated conduct is categorically unprotected. On the other hand, if a court finds that the law does apply to conduct within the scope of the Second Amendment, the court must then determine what level of constitutional scrutiny to apply.

The Appellate Court first held that banning the possession of firearms by felons does not impose a burden on conduct within the scope of the Second Amendment. The court relied on the language of **People v. Aguilar, 2013 IL 112116**, where the Illinois Supreme Court specifically found that the right to bear arms is subject to certain restrictions, and reaffirmed the validity of longstanding prohibitions on the possession of weapons by a felon. Restricting the right of convicted felons to possess guns thus does not implicate the Second Amendment.

Even if it did, however, the statute would not be unconstitutional since the appropriate level of scrutiny would be rational basis, not strict or intermediate scrutiny. And under a rational basis test, the

UUWF statute bears a rational relationship to the State's legitimate interest in protecting the health, safety, and general welfare of its citizens from the danger posed by convicted felons being in possession of weapons.

3. The statute as applied also does not violate defendant's right to due process and equal protection. The court rejected defendant's argument that the statutory process to obtain a FOID card is arbitrary because it grants some felons the right but denies it to others. The State's 20-year waiting period is a legitimate exercise of its interest in placing restrictions on the possession of weapons by felons, and there is nothing arbitrary about it.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

People v. Smith, 2016 IL App (1st) 140496 (No. 1-14-0496, 2/24/16)

Defendant was convicted of Unlawful Use of a Weapon by a felon, which carries a Class 2 felony sentence when committed by a person who is not confined in a penal institution but who has been convicted of a forcible felony. [720 ILCS 5/24-1.1\(e\)](#). A "forcible felony" is defined as treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnapping, kidnapping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement, and "any other felony which involves the use or threat of physical force or violence against any individual." [720 ILCS 5/2-8](#). Defendant contended that his prior conviction for aggravated battery of a peace officer was not a forcible felony and therefore could not be used to enhance his conviction.

The court concluded that because in 1990 the legislature amended the definition of "forcible felony" to include only aggravated batteries resulting in great bodily harm or permanent disability or disfigurement, it did not intend that all aggravated batteries were included in the definition of "forcible felonies." Thus, where defendant's prior conviction of aggravated battery to a peace officer was based on aggravated battery causing bodily harm to a police officer and not on great bodily harm or permanent disability or disfigurement, it was not a forcible felony.

The court rejected the argument that aggravated battery of a peace officer is a forcible felony under the residual clause for felonies that are not specifically listed but which involve the use or threat of violence or force. The court concluded that the residual clause is limited to offenses that are not specifically listed in the statute.

Because the trial court erred by using the prior conviction to enhance the aggravated battery conviction to a Class 2 offense, the cause was remanded for re-sentencing on a Class 3 felony.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

People v. Soto, 2014 IL App (1st) 121937 (No. 1-12-1937, 3/14/14)

Defendant was convicted of unlawful use of weapons by a felon (UUWF) under [720 ILCS 5/24-1.1\(a\)](#), which requires proof that defendant possessed a firearm or ammunition and had a prior felony conviction. Here, the State used defendant's prior 2008 felony conviction for aggravated unlawful use of weapons (AUUW) under [720 ILCS 5/24-1.6\(d\)\(1\),\(a\)\(3\)\(A\)](#) as the predicate offense. Defendant argued that his AUUW conviction was unconstitutional and void under [People v. Aguilar, 2013 IL 112116](#), and therefore could not serve as the predicate felony for his UUWF conviction.

The Appellate Court rejected this argument. In [Aguilar](#), the Illinois Supreme Court held that the Class 4 form of AUUW violated the Second Amendment and was facially unconstitutional. Defendant's 2008 conviction, however, was for the Class 2 form of AUUW since he had a still earlier 2005 felony conviction for delivery of a controlled substance that made the sentence for AUUW a Class 2 felony.

Although the Illinois Supreme Court has not yet determined whether the Class 2 form of AUUW is unconstitutional, both the United States Supreme Court in [District of Columbia v. Heller, 554 U.S. 570 \(2008\)](#), and the Illinois Supreme Court in [Aguilar](#), have observed that the Second Amendment right to keep and bear arms is subject to meaningful regulations, which include the longstanding prohibition against

possession of firearms by felons. In [People v. Burns, 2013 IL App \(1st\) 120929](#), the Appellate Court held that because there is no constitutional prohibition on banning the possession of a weapon by a felon, the Class 2 form of AUUW, which requires a previous felony conviction, does not violate the Second Amendment.

The Court agreed with the reasoning in [Heller](#), [Aguilar](#), and [Burns](#) that prohibiting the possession of firearms by felons is an acceptable limit on the right to bear arms. Accordingly, defendant's prior AUUW conviction and his current conviction for UUF were valid.

(Defendant was represented by Assistant Defender Arianne Stein, Chicago.)

[People v. Williams, 2011 IL App \(1st\) 091667-B \(No. 1-09-1667-B, revised op. 12/15/11\)](#)

[720 ILCS 5/24-1.6\(a\)\(1\)](#) defines aggravated unlawful use of a weapon as carrying a concealed weapon when one of several aggravating circumstances is present. [720 ILCS 5/24-1.1](#) defines unlawful use of a weapon by a felon as the possession of a weapon or ammunition by a person who has been convicted of a felony. Defendant was convicted of aggravated unlawful use of a weapon and unlawful use of a weapon by a felon for possessing a loaded handgun on a public street.

The Appellate Court rejected the argument that [§§5/24-1.6\(a\)\(1\) and 5/24-1.1](#) violate the Second Amendment as interpreted by [McDonald v. City of Chicago, 561 U.S. , 130 S.Ct. 3020, 177 L.Ed.2d 894 \(2010\)](#), and [District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 \(2008\)](#). [McDonald](#) and [Heller](#) hold only that the Second Amendment protects the right to possess handguns in the home for purposes of self-defense. In both decisions, the Supreme Court stated that the holdings do not implicate the ability of a State to restrict the possession of weapons outside the home or by convicted felons.

Because the right to possess a loaded handgun in the home for purposes of self-defense is not implicated by [§5/24-1.6\(a\)\(1\)](#) or by [§5/24-1.1](#), neither statute violates the Second Amendment.

(Defendant was represented by Assistant Defender Brian McNeil, Chicago.)

[People v. Wooden, 2014 IL App \(1st\) 130907 \(No. 1-13-0907, 8/8/14\)](#)

Under [725 ILCS 5/111-3\(c\)](#) when the State seeks to impose an enhanced sentence due to a prior conviction, the charge must state the intent to seek the enhanced sentence and set forth the prior conviction to give the defense notice. In [People v. Easley, 2014 IL 115581](#), the Illinois Supreme Court held that notice under §111-3(c) is required only if the prior sentence that would enhance the sentence is not an element of the charged offense.

Here, the State charged defendant with unlawful use of a weapon by a felon, alleging that the prior felony was vehicular hijacking. The prior conviction for vehicular hijacking was used to elevate the offense from a Class 3 to a Class 2 felony on the basis that it was a forcible felony. [720 ILCS 5/24-1.1\(e\)](#).

Defendant argued that he was improperly convicted of a Class 2 felony because the State did not give him notice that it would seek an enhanced sentence. Defendant further argued that [Easley](#) did not apply to his case because vehicular hijacking is not per se a forcible felony. Vehicular hijacking is not one of the specifically enumerated offenses in the forcible felony statute and, according to defendant, does not fall within the residual clause definition of forcible felony.

The Appellate Court rejected this argument finding that vehicular hijacking falls squarely within the definition of forcible felony. A defendant commits vehicular hijacking when he knowingly takes a motor vehicle from a person by the use or imminent threat of force. [720 ILCS 5/18-3\(a\)](#). A forcible felony includes several specifically enumerated felonies and any other felony which involves the use or threat of physical force or violence against any person. [720 ILCS 5/2-8](#).

The act of taking a motor vehicle from a person by force or threat of imminent force necessarily involves at least the contemplation that violence might be used. Defendant could not provide, and the court could not conceive of, a situation where a defendant could commit vehicular hijacking without using or threatening physical force or violence. Vehicular hijacking thus falls within the definition of forcible felony and [Easley](#) controls the outcome of this case. Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Sam Hayman, Chicago.)

[Top](#)

§53-3

Proof of Possession

[County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 \(1979\)](#) Statute creating a "permissive" presumption that all occupants of an auto are in possession of any firearm found therein was upheld. As applied to the facts of this case, there was a "rational connection between the basic facts proved and the ultimate fact presumed and the latter is more likely than not to flow from the former."

[People v. Bailey, 333 Ill.App.3d 888, 776 N.E.2d 824 \(3d Dist. 2002\)](#) To establish aggravated unlawful use of a weapon under [720 ILCS 5/24-1.6\(a\)\(3\)\(A\)](#), the State must prove that the defendant knowingly carried certain weapons on or about his or her person or in a vehicle. Knowing possession is an essential element of unlawful use of a weapon; otherwise, individuals could be convicted of an offense merely because they are in a vehicle in which a weapon is found. "Knowing possession" may be actual or constructive. Constructive possession requires a showing that the defendant: (1) knew that a weapon was present, and (2) exercised immediate and exclusive control over the area where the weapon was found. Knowledge of the existence of a firearm may be proved through circumstantial evidence; however, a defendant's mere presence, without more, does not establish knowledge that a weapon is present. Here, the State failed to prove beyond a reasonable doubt that defendant knew that a weapon was under the seat of a vehicle in which he was a passenger. Because the arresting officer testified that the weapon was not visible until he looked under the seat, the weapon was not visible to defendant as he sat in the car. No fingerprints were taken from the gun, which had never been reported as stolen or transferred. Similarly, the automobile in which the weapon was found had never been reported as stolen, and the State failed to establish any relationship between defendant and the owner of either the car or the weapon. Finally, neither of the arresting officers indicated that defendant made any gestures indicating he was trying to retrieve or hide a weapon.

[People v. Hampton, 358 Ill.App.3d 1029, 833 N.E.2d 23 \(2d Dist. 2005\)](#) The evidence was insufficient to sustain a conviction for unlawful use of a weapon. In a constructive possession case, the State proves the offense of unlawful use of a weapon where it shows that the defendant had knowledge of the presence of a weapon and immediate and exclusive control over the area in which it was found. The court acknowledged Illinois precedent that the location of a weapon may give rise to an inference of constructive possession which is sufficient to sustain a conviction, at least where no other evidence creates a reasonable doubt of guilt. The court found, however, that such precedent concerns contraband found in the defendant's residence or living quarters. The court found that a loaded handgun is rarely present in the glove compartment of a vehicle without the knowledge of the driver. To prove unlawful use of a weapon based on the presence of a weapon under such circumstances, therefore, the State must prove that the defendant "had regular, ongoing control over the vehicle that he was driving, similar to the regular and ongoing control that one has over his own living quarters." Such control can be shown by evidence that the defendant owns or regularly drives the vehicle.

In this case, the State proved only that defendant was driving the car at the time of the stop, not that he had ever driven the car before or had any level of control over it. In addition, the State failed to present other evidence from which defendant's knowledge of the weapon could be inferred. The factors to be considered in this inquiry include: (1) the visibility of the weapon from defendant's location in the vehicle; (2) the amount of time in which defendant could have observed the weapon; (3) any gestures or movements

suggesting an effort by the defendant to retrieve or conceal the weapon; and (4) the size of the weapon. None of these factors showed that defendant knew of the weapon in the glove compartment. First, the gun was small and found inside a sock in the glove compartment, and thus would not have been visible to defendant as he drove. Second, the vehicle belonged to defendant's deceased brother, but defendant had never driven it before the date of his arrest. Third, defendant had been driving only a few minutes before the stop, and the officer who conducted the stop testified that defendant made no furtive movements.

[People v. Davis, 50 Ill.App.3d 163, 365 N.E.2d 1135 \(3d Dist. 1977\)](#) The fact that defendant was a passenger in an automobile in which a shotgun was found was not sufficient to support a conviction for UUC. Although the UUC statute permits a presumption that every passenger in an automobile is in possession of any weapon present therein, the State must also prove that the possession was "knowing." Here, the prosecution introduced no evidence from which defendant's knowledge of the gun could be inferred. Compare, [People v. McKnight, 39 Ill.2d 577, 237 N.E.2d 488 \(1968\)](#) (circumstantial evidence of possession was sufficient where "defendant made motions with his right hand and a dipping motion of the shoulder prior to being stopped," a companion was armed, and a loaded pistol was found under his seat).

[People v. Seibech, 141 Ill.App.3d 45, 489 N.E.2d 1138 \(3d Dist. 1986\)](#) Although a person driving his own car is presumed to knowingly possess a firearm found within it, that presumption was rebutted by the uncontradicted defense testimony. Defendant testified that earlier in the day he had driven two men to an area where they hunted. Later that day defendant drove the men home. Defendant said that he had not known that one of the hunters had left a rifle on the back floorboard. One of the hunters corroborated defendant's testimony and said that he had inadvertently left his rifle on the floor of defendant's car. The hunter's testimony was "plausible" and "could not reasonably be disregarded by the jury." Thus, in view of the hunter's uncontradicted testimony and the "tenuous nature of the inference," it "cannot be said that the State established beyond a reasonable doubt that defendant knowingly possessed a firearm."

[People v. Coburn, 25 Ill.App.3d 542, 323 N.E.2d 559 \(1st Dist. 1975\)](#) A conviction for possession of shotgun with a barrel of less than 18 inches was reversed. The stock of a shotgun was found adjacent to the defendant, who was sleeping, and a barrel was found "in another location in the basement." There was no evidence that the barrel belonged to the stock, and it could have been designed for a second sawed-off shotgun found in another part of the basement.

Cumulative Digest Case Summaries §53-3

[In re Nasie M., 2015 IL App \(1st\) 151678 \(No. 1-15-1678, 12/1/15\)](#)

1. When a defendant challenges the sufficiency of the evidence, the reviewing court must decide whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Generally, the trier of fact is in the best position to judge credibility and it is not the function of the reviewing court to retry the case. A finding of guilt will only be reversed where the proof was so improbable, implausible, or unsatisfactory that reasonable doubt exists.

2. Following a bench trial, defendant was convicted of several gun offenses, all of which required proof that he possessed a gun. The State's evidence showed that the police spoke with defendant at a vacant lot where he had been shot in the foot. Defendant was taken to the hospital and the police went to his girlfriend's apartment, where they found a gun under a mattress. The gun contained a live, unfired cartridge.

An officer interviewed defendant at the hospital where he was being treated and was on pain medication. Defendant initially told the officer that he had been shot by two assailants who were behind him. The officer observed that the wound was to the top of defendant's foot and questioned defendant's version

of events. He also told defendant that a gun had been recovered from his girlfriend's house. Defendant then admitted the gun was his. He told the officer that he had been carrying the gun, accidentally shot himself in the foot and then took the gun back to his girlfriend's house.

Defendant, by contrast, testified that two men fired several shots at him as he attempted to flee from them. He had two gunshot wounds to the bottom of his foot and one wound to the top. The hospital gave him medication for his extreme pain, which put him in and out of sleep. He did not recall speaking to any officers at the hospital and denied telling the police that he shot himself in the foot.

In finding defendant guilty, the trial court acknowledged that the police could have done a more thorough investigation, including testing defendant for gunshot residue and test-firing the gun. But the court found that the officer who questioned defendant was believable and defendant was not, and that defendant "admits shooting himself."

3. The Appellate Court reversed outright defendant's convictions for the weapons offenses holding that the State failed to prove that defendant possessed a firearm. The court observed that the State had provided no reason why defendant's admission that he possessed the gun should be presumed to be more credible than his trial testimony denying that possession. Moreover, the version of events in the admission were "not necessarily corroborated" by the other evidence. Under that version, defendant would have had to shoot himself in the foot, run or hop to his girlfriend's apartment, get rid of the gun, and then return to the scene of the shooting where he spoke to the police, all within a short span of time.

The court gave little weight to the significance of the officer's observation of a gunshot wound to the top of defendant's foot since the officer was not an expert in gunshot wounds. The court also noted the absence of eyewitness testimony, forensic evidence and medical evidence. The court thus concluded that the State failed to prove defendant's guilt beyond a reasonable doubt.

(Defendant was represented by Assistant Defender Kristen Mueller, Chicago.)

People v. Anthony, 408 Ill.App.3d 799, 951 N.E.2d 507 (1st Dist. 2011)

1. As a matter of first impression, the Appellate Court held that the plain language of the current version of [720 ILCS 5/24-1.1\(e\)](#) permits multiple convictions for unlawful use of a weapon by a felon where the defendant possesses a loaded weapon. Defendant's convictions for possession of the weapon and possession of the ammunition in the clip were affirmed.

Although [People v. Carter, 213 Ill.2d 295, 821 N.E.2d 233 \(2004\)](#), held that the simultaneous possession of a firearm and ammunition gives rise to only one offense, the court noted that the legislature subsequently amended the unlawful possession of a weapon by a felon statute to provide that "[t]he possession of each firearm or firearm ammunition in violation of this Section constitutes a single and separate violation." ([720 ILCS 5/24-1.1\(e\)](#)).

2. In dissent, Justice Gordon concluded that only one conviction of unlawful possession of a weapon by a felon may be entered for possession of a single loaded firearm. Justice Gordon concluded that the amendment in response to **Carter** did not resolve whether multiple convictions can be entered for the possession of a loaded firearm, and that under the majority's analysis there would be an absurd result because separate convictions could be ordered for the possession of the firearm and for each round of ammunition in the clip. Justice Gordon concluded that the amendment was ambiguous on this point and should be interpreted to permit only a single conviction for possession of a loaded firearm.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Falco, 2014 IL App (1st) 111797 (No. 1-11-1797, 8/12/14)

Defendant was convicted of possession of a firearm with defaced identification marks, which is defined as possessing any firearm where the importer's or manufacturer's serial number has been defaced, altered, removed, or obliterated. [720 ILCS 5/24-5\(b\)](#). The statute does not explicitly state the applicable mens rea. The jury was instructed with a non-IPI instruction which tracked the language of the statute but, like the statute, omitted any reference to a mental state.

Counsel was ineffective for failing to request an instruction informing the jury that to prove defendant guilty of the charged offense, the State had to prove that he knowingly or intentionally possessed the firearm. Although the statute does not specify a mental state, Illinois law is clear that the State must prove that the defendant intentionally or knowingly possessed the firearm, although the State does not have to prove that defendant knew of the defacement.

Where the statute does not specify a mental state, and instead one is implied, it is not always necessary to instruct the jury on the necessary mental state. Some mental states, however, may be specific enough to require a jury instruction. Here, the implied mental state of intent and knowledge was specific enough to require instruction. The present offense was no different than any other possession charge. Typical possession cases, such as unlawful use of a weapon, require the State to prove knowing possession and the corresponding IPI instructions inform the jury of this element.

There is no IPI instruction for the offense at issue here, but the jury should have been given a modified instruction that included the appropriate mental state as one of the elements of the offense. In the absence of such an instruction, the jury could have concluded that this was a strict liability offense; there was no likelihood that the jury would have understood that knowledge was the appropriate mental state or that knowledge applied only to possession, not to defacement.

The conviction was reversed and remanded for a new trial.

[People v. Fernandez, 2016 IL App \(1st\) 141667 \(No. 1-14-1667, 12/20/16\)](#)

A defendant has constructive possession of contraband where he knows the contraband was present and exercised “immediate and exclusive” control over the area where the contraband was found.

The police obtained a search warrant for a house and garage. On the evening before they conducted the search, the police saw defendant get out of car and engage in a suspected narcotics transaction. The police arrested defendant and found him in possession of suspected heroin. They also recovered keys from defendant. They found suspected heroin and a woman inside defendant’s car. (The State never charged defendant with any offenses related to the heroin recovered from defendant or his car.)

The following morning the police searched the home and garage. The keys found on defendant opened the locks to both the home and the garage. The police found an unidentified man in the house. In a bedroom, the police found a gun underneath a mattress, a passport and insurance cards with defendant’s name, and framed photographs of defendant and the woman in the car. The closet had men’s and women’s clothing. The police found more framed photographs of defendant and the woman in the living room. In the garage, the police found three guns, ammunition, and heroin in a broken van with flat tires. The parties stipulated that defendant received mail at another address.

The court held that the State failed to prove defendant was in constructive possession of the heroin and guns found inside the house and garage. The court noted that evidence of residency, which often takes the form of rent receipts, utility bills, or mail, did not link defendant to the house and garage. Instead, the only mail addressed to defendant linked him to another residence. Although the police found numerous personal effects tied to defendant in the house (insurance cards, passport, framed pictures) and defendant’s keys unlocked the house and garage doors, none of this evidence showed defendant’s control over the premises. And the presence of another man in the house weighed against a finding that defendant controlled the premises.

Even if defendant had some connection with the residence, no evidence placed him there on the date of the search. All the contraband was concealed, either under a mattress or inside the inoperable van. Even assuming defendant had access to the house and garage, nothing suggested he knew about the hidden contraband.

The court reversed defendant’s convictions.

(Defendant was represented by Assistant Defender Kadi Weck, Chicago.)

[People v. McIntyre, 2011 IL App \(2d\) 100889 \(No. 2-10-0889, 12/14/11\)](#)

1. To convict defendant under an accountability theory of unlawful possession of a weapon by a felon, the State must first establish a *prima facie* case against the principal. An essential element of that offense is that the principal is a convicted felon. Although defendant was a convicted felon, the principal was not. Because absent that evidence, the State failed to prove that the principal committed the offense of unlawful possession of a weapon by a felon, defendant could not be convicted of that offense under an accountability theory.

2. To prove that the defendant constructively possessed a weapon, the State had to establish that defendant had: (1) knowledge of the presence of the weapon, and (2) immediate and exclusive control over the area where the weapon was found. Knowledge of the presence of the weapon is not the equivalent of possession. Nor is proximity to the weapon sufficient to show possession. A defendant's status as the owner-driver of a car does not prove his possession of everything within the passenger area when there are passengers present who may possess the contraband. Possession may be held jointly by the owner-driver and other passengers, but the evidence must support the conclusion that the defendant had control, or the ability to exercise control, over the contraband.

Defendant had knowledge of the presence of the weapon when his passenger fired shots from the front passenger seat of defendant's car. But defendant, who was the owner-driver of the car, did not have control, or the ability to exercise control, over the weapon, where the police found the gun in an opening between the plastic base of the front-passenger seat and the leather portion of that seat, on the side of the seat closest to the front-passenger door.

The court reversed defendant's conviction for unlawful possession of a weapon by a felon.
(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

People v. Moore, 2015 IL App (1st) 140051 (No. 1-14-0051, 12/16/15)

Defendant was convicted of unlawful possession of ammunition by a felon and possession of a controlled substance after police officers executed a search warrant for the home of defendant's great-grandmother. Defendant was observed jumping out a window as police approached the house. Officers recovered ammunition from a desk in the living room and from the basement rafters, and also found what they suspected to be cocaine in the rafters. In addition, in one of three bedrooms officers discovered mens' clothing and a letter that was addressed to the defendant at the house.

Defendant's great-grandmother testified that defendant did not live at the house, but that he had been at the house on the day of the search and had received mail there. In addition, defendant's sister and a friend testified that he did not live at the house.

The Appellate Court reversed the convictions, finding that the evidence failed to prove that defendant had constructive possession of the contraband.

1. Possession of contraband may be actual or constructive. Where the defendant was not observed in the presence of the recovered contraband, the State was required to prove constructive possession. To establish constructive possession, the State must show that the defendant had knowledge of the contraband and exercised immediate and exclusive control over the area where the contraband was found. Constructive possession can be proven by evidence that the defendant once had physical control over the contraband, intended to exercise control again, and did not abandon the items, and that no other person obtained possession.

Constructive possession is typically proved through circumstantial evidence such as acts, statements, or conduct which support an inference that defendant knew the prohibited items were present. In addition to knowledge, the State must prove that the defendant exercised immediate and exclusive control over the area where the contraband was found.

2. The court concluded that even taken most favorably to the State, the evidence did not establish that defendant had knowledge of the contraband. First, although officers found mail addressed to defendant and men's clothing in the bedroom, the contraband was not found in the bedroom. In addition, the mail had been postmarked more than six months earlier and the clothing was not specifically linked to defendant.

The court acknowledged that defendant fled as police approached, but noted that flight is only one factor and must be considered with all of the other evidence.

3. Even had the State proven that defendant knew of the contraband, there would have been insufficient evidence that he had immediate and exclusive control over the area where the contraband was found. Although residency at property where contraband is found may show control of the premises, there was insufficient evidence here to show that defendant lived on the premises. Not only was the letter found in the bedroom six months old, but the clothing was not shown to belong to defendant. In addition, defendant presented three witnesses who testified that he did not live at the house. Under these circumstances, defendant did not have exclusive control of the area where the contraband was found.

(Defendant was represented by Assistant Defender Robert Melching, Chicago.)

People v. Sams, 2013 IL App (1st) 121431 (No. 1-12-1431, 12/6/13)

When defendant is not found in actual possession of a firearm, to prove that defendant unlawfully possessed the weapon, the State must prove constructive possession. The State establishes constructive possession by proving beyond a reasonable doubt that (1) defendant knew that a firearm was present, and (2) exercised immediate and exclusive control over the area where the firearm was found. Mere presence in the vicinity or access to the area where the firearm is found is insufficient to establish constructive possession.

The State failed to prove beyond a reasonable doubt that the defendant constructively possessed a firearm. A caller to 911 mentioned defendant's name and that he had pointed a gun at her son, but she did not describe the offender or the gun or state that she had witnessed the events she described first hand. The officers who responded to the call did not observe defendant in actual possession of a gun and no physical evidence connected defendant to a gun. The evidence was only that defendant walked out of a house he was visiting, and the police found a gun under a couch when they later conducted a search of the house with the owner's consent. The police had not noticed the gun when they first entered the home, and never even saw defendant in the same room where they found the gun.

(Defendant was represented by Assistant Defender Sharifa Rahmany, Chicago.)

People v. Smith, 2015 IL App (1st) 132176 (No. 1-13-2176, 7/15/15)

1. To sustain a conviction for aggravated unlawful use of a weapon by a person under the age of 21, the State must prove that a person who was under 21 knowingly carried or concealed a firearm on or about his person or in a vehicle at a time when he was not involved in certain lawful activities under the Wildlife Code. "Knowing possession" may be either actual or constructive. The State establishes constructive possession by demonstrating that the defendant knew of the weapon's presence and exercised control over the area where it was found.

Knowledge is usually established by circumstantial evidence. A person who has the intent and capability to maintain control and dominion over an item satisfies the intent element of constructive possession even if he lacks present personal dominion over the object.

2. The State offered sufficient circumstantial evidence for a rational trier of fact to conclude that defendant had constructive possession of a gun that was found in a bag that was left on a bus after all passengers had disembarked. Not only did the driver state that defendant claimed ownership, but the fact that defendant approached the driver just after the latter exited the bus with the bag supported an inference that defendant hoped to regain control over the bag. In addition, the bag was found in the last row, where defendant had been sitting, and was unzipped so that the handle of a pistol was visible. Finally, defendant's statement to the driver that the bag contained a BB gun created a reasonable inference of knowing possession because defendant had not been shown the contents of the bag but claimed to know what it contained.

The court also noted that the trial court's ruling relied on its findings concerning witness credibility, and that a court of review may not substitute its judgment on credibility for that of the trier of fact.

Defendant's conviction for aggravated unlawful use of a weapon was affirmed.

(Defendant was represented by Assistant Defender Arianne Stein, Chicago.)

[People v. Wright, 2013 IL App \(1st\) 111803 \(No. 1-11-1803, 5/7/13\)](#)

To prove that defendant constructively possessed a weapon, the State must prove defendant's knowledge of the weapon and that defendant exercised immediate and exclusive control over the area where the weapon was found. The mere presence of a weapon is insufficient to prove that defendant had knowledge of the weapon.

Police witnesses testified that the police chased defendant and another person down a flight a stairs into a basement area where the other person fell over the defendant. The police recovered a gun that protruded from under the torso of the prone defendant. Three other persons were already present in the basement. Defendant did not live or work in the building.

This evidence was insufficient to prove that defendant possessed the gun. None of the witnesses saw a gun in defendant's hands or noticed him make any action consistent with discarding the gun. No physical evidence connected him to the gun. The mere presence of the gun did not prove that defendant had knowledge of it. There was no evidence that defendant exercised exclusive or immediate control over the area where the weapon was found.

The Appellate Court reversed defendant's conviction for aggravated unlawful use of a weapon.
(Defendant was represented by Assistant Defender Peter Sgro, Chicago.)

[Top](#)

§53-4

Proof of Concealed Weapon

[People v. Gokey, 57 Ill.2d 433, 312 N.E.2d 637 \(1974\)](#) The element of "concealment" was sufficiently proved where gun fell from defendant's trouser leg. See also, **[People v. Ostrand, 35 Ill.2d 520, 221 N.E.2d 499 \(1966\)](#)**; **[People v. Euctice, 371 Ill. 159, 20 N.E.2d 83 \(1939\)](#)**.

[People v. House, 29 Ill.App.3d 994, 331 N.E.2d 72 \(1st Dist. 1975\)](#) The evidence showed that defendant was standing at the rear of his property with an unconcealed revolver in his hand. When police approached, defendant threw the gun into a partially full garbage can several paces from him. The Court held that defendant was not carrying a concealed weapon when the gun was in the garbage can; the gun was not accessible for immediate use, and retrieving it would have required an appreciable change of position by defendant.

[Top](#)

§53-5

Exemptions

§53-5(a)

Inaccessible or "Broken Down" Weapon

[People v. Smith, 71 Ill.2d 95, 374 N.E.2d 472 \(1978\)](#) The Court held that the defendant has the burden of proving, by a preponderance of the evidence, that the exemption of inaccessibility applies. See also, **[People v. Hesler, 289 Ill.App.3d 1084, 682 N.E.2d 1224 \(4th Dist. 1997\)](#)** (defendant failed to present sufficient evidence to establish that his weapon was disassembled when he placed it in his truck, as opposed to being

disassembled only when he saw police officers at a roadside safety check).

[**People v. McKnight**, 39 Ill.2d 577, 237 N.E.2d 488 \(1968\)](#) A loaded pistol that was four to five inches under the front seat of the automobile was "immediately accessible" and did not come within statutory exemption.

[**People v. Williams**, 266 Ill.App.3d 752, 640 N.E.2d 1275 \(1st Dist. 1994\)](#) The fact that a gun is unloaded does not render it inaccessible under [720 ILCS 5/24-2\(b\)\(4\)](#). Declining to follow [**People v. Freeman**, 196 Ill.App.3d 375, 553 N.E.2d 780 \(3d Dist. 1990\)](#), the Court concluded that the inaccessibility exemption concerns only the proximity of a weapon to the defendant and his capability to reach it, and the exemption for a "broken down" weapon requires that the gun be disassembled and non-functioning.

[**People v. Freeman**, 196 Ill.App.3d 370, 553 N.E.2d 780 \(3d Dist. 1990\)](#) The defendant was convicted of UUV for carrying a handgun in his car. A pistol cylinder was found in defendant's pocket, while the remainder of the pistol was in a box on the front seat. Defendant had separated the pistol from the cylinder to transport it. The Court held that defendant proved the statutory exemption of "transportation of weapons broken down in a nonfunctioning state or not immediately accessible". The Court stated that a "broken down cylinderless pistol, incapable of being fired, not in immediate operating condition, and not immediately accessible to the defendant, is not a deadly weapon within the purview of the unlawful-use-of-weapons statute."

[**People v. Staples**, 8 Ill.App.3d 400, 410 N.E.2d 592 \(3d Dist. 1980\)](#) A revolver in a storage box in the bed of a pickup truck was not immediately accessible to the driver.

[**People v. Cook**, 46 Ill.App.3d 511, 361 N.E.2d 81 \(1st Dist. 1977\)](#) Inaccessibility of a pistol was proven by the evidence; both State and defense evidence showed that the pistol was under the car hood while defendant was in the front seat behind the steering wheel. To get the gun, defendant would have had to get out of the car, walk to the front, and open the hood.

[**People v. Jastrzemski**, 196 Ill.App.3d 1037, 554 N.E.2d 583 \(1st Dist. 1990\)](#) Defendant was convicted of unlawful use of weapons by a felon for having a gun under the hood of his car. Defendant argued that the gun was not "on or about his person" or "immediately accessible." The Court held that to sustain a conviction the weapon need not be "immediately accessible" In addition, the gun was "on or about [defendant's] person" since defendant knew that the gun was under the hood of his car, which he was driving.

[**People v. Johnson**, 49 Ill.App.3d 567, 364 N.E.2d 590 \(1st Dist. 1977\)](#) Defendant was properly convicted of UUV for having a pistol in a holster on the rear seat of his car, in which he was a front-seat passenger. The pistol was immediately accessible because it would have been very easy for defendant to reach into the back seat and pick up the weapon. See also, [**People v. Bolling**, 181 Ill.App.3d 845, 537 N.E.2d 1100 \(2d Dist. 1989\)](#).

[Top](#)

§53-5(b)

On Own Land or In Own Abode

[**People v. Laubscher**, 183 Ill.2d 330, 701 N.E.2d 489 \(1998\)](#) Where an exception "appears as part of the body of a substantive offense," the State has the burden of disproving it beyond a reasonable doubt in order to obtain a conviction for the offense. The State may rely upon circumstantial evidence to carry this burden,

but must prove each element of the crime beyond a reasonable doubt. Because §24-1(a)(4) includes the exception for possession on one's land within the statutory definition of unlawful use of weapons, the State has the burden of disproving the exception beyond a reasonable doubt. Where the State offered only evidence that defendant lived in the building where the offense occurred, without showing whether he had any ownership interest in the building or surrounding land, it failed to carry its burden of proof. The court rejected the State's argument that even if defendant owned the land, the "on his land" exception is inapplicable to "a common area of the property that [is] readily accessible to the public and residents of the building." Although some courts have adopted an exception to the "on his land" exception for property that is open to the public, the plain language of §24-1(a) does not permit such an interpretation in Illinois. See also, [People v. Hayes, 308 Ill.App.3d 194, 719 N.E.2d 372 \(2d Dist. 1999\)](#) (State failed to prove beyond a reasonable doubt that defendant was not on his land where the parties presented no evidence as to the ownership of the alley in which the alleged offense occurred; the court rejected the State's argument that a defendant may not invoke the "on his land" exception for locations that are readily accessible to the public).

[People v. Anderson, 117 Ill.App.3d 806, 454 N.E.2d 34 \(1st Dist. 1983\)](#) Defendant was convicted of UUW for possessing a loaded revolver while in the apartment of a person named Elston. Elston testified that he lived alone in the apartment. Paragraph 24-1(a)(10) prohibits carrying a firearm within a city "except when on [defendant's] land or in his own abode or fixed place of business." The Court held that although Elston's testimony established that defendant was not in her own abode, the State failed to prove that she was not on her own land or fixed place of business. Because the State failed to prove the essential elements of the offense, the conviction was reversed.

[People v. Taylor, 28 Ill.App.3d 186, 328 N.E.2d 325 \(1st Dist. 1975\)](#) A conviction for carrying a concealed weapon was reversed because the State failed to prove that defendant was not at his "own abode" at time of the incident. Defendant testified that he lived at the apartment in question "off and on" and had clothes there. The Court held that the "abode" is not equivalent to a "permanent abode" or "residence." Thus, even where one has a permanent address, another apartment may be an "abode" for purposes of the UUW statute.

[People v. Chmilenko, 44 Ill.App.3d 1060, 358 N.E.2d 1247 \(1st Dist. 1976\)](#) The State failed to prove that defendant was not on his own land at the time of the alleged offense. The exception contained in the unlawful use of a weapon statute is part of the substantive definition of the offense and must be negated beyond a reasonable doubt. See also, [People v. Laubscher, 288 Ill.App.3d 438, 680 N.E.2d 514 \(4th Dist. 1997\)](#) (evidence was insufficient to establish beyond a reasonable doubt that defendant was not on his own land).

[People v. Wilson, 29 Ill.App.3d 1033, 332 N.E.2d 6 \(1st Dist. 1975\)](#) The statutory exception for possession of a weapon on one's land or in one's abode does not apply to public areas of an apartment building. See also, [People v. Cosby, 118 Ill.App.2d 169, 255 N.E.2d 54 \(1st Dist. 1969\)](#) (exception for "fixed place of business" does not include a taxicab).

Cumulative Digest Case Summaries §53-5(b)

[People v. Tolbert, 2016 IL 117846 \(No. 117846, 1/22/16\)](#)

1. In deciding whether an exemption from a criminal statute is an element that must be charged and proved by the State, courts do not look solely at where the exemption is placed in the statute. Instead, courts determine more generally whether the legislature intended the exemption to be "descriptive" of the offense, or whether it intended only to withdraw certain acts or persons from the operation of the statute.

A defendant charged with aggravated unlawful use of a weapon for possessing a firearm while under

21 years of age will not be criminally liable if he possessed the firearm while “on the land or legal dwelling of another person as an invitee with that person’s permission.” 720 ILCS 24-1.6(a)(1), (a)(3)(1). The exemption is located in both the statute describing the offense and in a separate section specifically titled “Exemptions.” [720 ILCS 5/24-2\(b\)\(5\)](#). The exemptions section also states that a charging instrument does not need to “negative any exemptions,” and that the “defendant shall have the burden of proving such an exemption.” [720 ILCS 5/24-2\(h\)](#).

2. Defendant was convicted of aggravated unlawful use of a weapon while under the age of 21 for possessing a firearm on the property of another person. The State did not charge or prove that defendant was not an invitee on that person’s property.

The Supreme Court held that the invitee requirement was not an element of the offense that the State was required to plead and prove at trial. The plain language of section 24-2 established that the legislature intended the invitee requirement to be an exemption to the offense, not an element. It was therefore the defendant’s burden to prove his entitlement to the exemption, not the State’s obligation to charge and prove that it did not exist.

The Supreme Court vacated the Appellate Court’s decision reversing defendant’s conviction and remanded the cause for consideration of defendant’s remaining issues.

(Defendant was represented by Assistant Defender Rob Melching, Chicago.)

[People v. Aguilar, 408 Ill.App.3d 136, 944 N.E.2d 816 \(1st Dist. 2011\)](#)

Defendant was convicted in a bench trial of aggravated unlawful use of a weapon for knowingly carrying a loaded firearm when he was not in his own home or place of business.

At the time of the offense, [720 ILCS 5/24-1.6\(a\)\(1\)](#) defined aggravated unlawful use of a weapon as carrying an uncased, loaded and immediately accessible weapon on one’s person or concealed on one’s person “except when on his or her land or in his or her abode or fixed place of business. . .” Approximately a year after the offense, the statute was amended to provide that the offense was committed when one carried a weapon “except when on his or her land or in his or her abode, legal dwelling, or fixed place of business, ***or on the land or in the legal dwelling of another person as an invitee with that person’s permission.***” ([P.A. 96-742](#), eff. 8/25/09)

1. The court found that the amended version of the AUUW statute was intended to apply only to conduct which occurred after its effective date. Thus, the amended statute did not apply to defendant’s conduct.

2. Even if the statutory amendment applied, it would not have authorized defendant’s conduct. Public Act 96-742 excepted from the offense possession of a weapon by an invitee on the land or in the legal dwelling of another, where the invitee has “that person’s permission.” Because it could be inferred from the evidence that defendant’s friend had not consented to the possession of a firearm in his backyard, defendant’s conduct would not have fallen within the exception even if the amended statute applied.

3. The court concluded that the AUUW statute did not violate the defendant’s Second Amendment rights under [Columbia v. Heller, 554 U.S. 570 \(2008\)](#) and [McDonald v. City of Chicago, ___ U.S. ___, 130 S.Ct. 3020, 177 L.Ed.2d 894 \(2010\)](#).

A. Generally, constitutional challenges are addressed under the “rational basis” or “strict scrutiny” tests. In [Heller](#), the court concluded that the “rational basis” test does not afford a sufficient level of judicial scrutiny where the statute in question regulates a specific, enumerated constitutional right, such as the right to bear arms.

The Appellate Court also found that the “strict scrutiny” standard does not provide an appropriate level of review for Second Amendment issues. The “strict scrutiny” standard examines a statute to determine whether it is narrowly tailored to achieve a compelling governmental interest, and is most often used for race-based legislation or classifications or where a statute interferes with a fundamental constitutional right such as freedom of speech.

Noting that the U.S. Supreme Court has not specified a standard of review for Second Amendment

issues, the court endorsed the “intermediate scrutiny” standard of review adopted by some jurisdictions when reviewing statutes which impose “less than severe” restrictions on the possession of firearms. Under the “intermediate scrutiny” standard, the court examines whether the law in question serves a significant, substantial, or important governmental interest and if so, whether the “fit” between the regulation and the asserted interest is reasonable.

B. The court concluded that by imposing harsher penalties for carrying a loaded weapon outside one’s property, even in the absence of a criminal objective, the AUUW statute serves the important governmental interest of protecting the safety of police officers and the general public. There is a reasonable fit between the AUUW statute and this objective, as evidenced by the fact that the AUUW statute has been repeatedly upheld against due process challenges. Furthermore, because **Heller** and **McDonald** held only that the Second Amendment allows citizens to possess a handgun *in the home* for self-defense purposes, and do not recognize a right to possess weapons outside the home, neither case invalidates restrictions on the right to possess weapons outside the home.

4. In [Kalodimos v. Village of Morton Grove, 103 Ill.2d 483, 470 N.E.2d 266 \(1984\)](#), the Illinois Supreme Court rejected an Illinois state constitutional challenge to a city ordinance which absolutely prohibited the possession of handguns. The court acknowledged that in light of **Heller** and **McDonald**, the interpretation of the Illinois Constitution adopted in [Kalodimos](#) might be invalid. Because the Appellate Court lacks authority to overrule decisions of the Illinois Supreme Court, however, only the Supreme Court can decide whether **Kalodimos** is to be reconsidered.

(Defendant was represented by Assistant Defender David Holland, Chicago.)

[Top](#)

§53-5(c)

Other Exemptions

[People v. Lofton, 69 Ill.2d 67, 370 N.E.2d 517 \(1977\)](#) In order to come within the security guard exemption of the UUW statute, the defendant must carry on his person documentation that he is a security guard who has received the training required by statute. It is not sufficient for a person claiming the exemption to merely produce the documentation in court.

[People v. Bruner, 285 Ill.App.3d 39, 675 N.E.2d 654 \(4th Dist. 1996\)](#) Exemption under [720 ILCS 5/24-2\(i\)](#) (for unloaded weapons enclosed in case and transported by holder of valid FOID card) applied to unloaded gun contained in case and carried in purse as defendant attempted to enter the courthouse. The Court rejected the argument that the exemption was intended to apply only when the gun was being transported to a particular location (e.g., to one's home after purchase or to a hunting site), and not while merely "walking down the street."

[People v. Diggins, 379 Ill.App.3d 994, 888 N.E.2d 129 \(3d Dist. 2008\)](#) [720 ILCS 5/24-1.6](#) provides that the holder of a valid FOID card does not commit unlawful use of a weapon by possessing a weapon that is "unloaded and enclosed in a case, firearm carrying box, shipping box, or other container." The Appellate Court concluded that the trial judge erred by instructing the jury that as a matter of law, the locked center console of an automobile is not a "case." The court rejected [People v. Cameron, 336 Ill.App.3d 548, 784 N.E.2d 438 \(4th Dist. 2003\)](#), which held that only a portable container can constitute a "case" under [§5/24-1.6](#). "If the legislature intended the word 'case' to be limited to portable containers, it would have stated so in the statute." The court concluded that for purposes of [§5/24-1.6](#), the term "case" should be defined as a container which completely encloses the weapon. Because the locked center console of a vehicle clearly qualifies, the trial court erred by ruling otherwise. The trial court abused its discretion by instructing the jury that a locked center console could not be a "case," and by refusing to instruct the jury on the

container exception of [§5/24-1.6](#). In addition, the lower court erred by prohibiting defendant from arguing to the jury that the console qualified for the statutory exception for encased weapons.

Cumulative Digest Case Summaries §53-5(c)

[People v. Diggins, 235 Ill.2d 48, 919 N.E.2d 327 \(2009\)](#)

1. Under [720 ILCS 5/24-1.6\(c\)\(iii\)](#), a person who holds a valid FOID card is not guilty of aggravated unlawful use of a weapon if the weapon is “unloaded and enclosed in a case, firearm carrying box, shipping box, or other container.” The court rejected the State’s argument that the statutory exception applies only to “cases” that are intended to carry firearms, noting that such an interpretation is not supported by the plain language of the statute and would render parts of the statute meaningless.

The court also rejected the reasoning of [People v. Cameron, 336 Ill.App.3d 548, 784 N.E.2d 438 \(4th Dist. 2003\)](#), which required that a case or container be “portable” in order to qualify for the §24-1.6(c)(iii) exception. The court noted that the legislature did not include a portability requirement in the statute.

2. Because the legislature did not specifically define the term “case” for purposes of §24-1.6(c)(iii), the term is presumed to have its ordinary and popularly understood meaning - a “box or receptacle to contain or hold something.” The court concluded that a compartment in the center console of a vehicle is a “case” under this definition, and that enclosure of an unloaded weapon in such a compartment therefore qualifies for the statutory exception.

In view of disputed evidence in the record, the cause was remanded for the lower court to determine whether the weapons in question were “enclosed” at the time of the stop.

[People v. Holmes, 241 Ill.2d 509, 948 N.E.2d 617 \(2011\)](#)

1. The aggravated U UW statute exempts from its prohibition firearms that are “unloaded and enclosed in a case, firearm carrying box, shipping box, or other container by a person who has been issued a currently valid Firearm Owner’s Identification Card.” [720 ILCS 5/24-1.6\(c\)\(iii\)](#). In [People v. Diggins, 235 Ill.2d 48, 919 N.E.2d 327 \(2009\)](#), the court held that a firearm stored in the center console of a vehicle qualifies for the exemption as a firearm enclosed in a case.

The defendant was charged with aggravated U UW for carrying an “uncased, loaded and immediately accessible” firearm in his vehicle in violation of [720 ILCS 5/24-1.6\(a\)\(1\)\(3\)\(A\)](#). Relying on [Diggins](#), the court held that the State failed to prove that the firearm was uncased where it was undisputed that the police recovered the firearm from within a closed and latched backseat armrest, because that container “fell within the meaning of a case under section 24-1.6.”

2. A person commits the offense of aggravated U UW when he carries a firearm in his vehicle and “has not been issued a currently valid Firearm Owner’s Identification Card.” [720 ILCS 5/24-1.6\(a\)\(1\)\(3\)\(C\)](#). The FOID Card Act provides that no person may acquire or possess a firearm in Illinois without a FOID card, but exempts from its requirement “[n]onresidents who are currently licensed or registered to possess a firearm in their resident state.” [430 ILCS 65/2\(b\)\(10\)](#).

The non-resident exemption of subsection (b)(10) is incorporated into the U UW statute, and therefore a valid permit or license from another state can substitute for the FOID card requirement of [720 ILCS 5/24-1.6\(a\)\(1\)\(3\)\(C\)](#). Reading the statutes separately would result in the absurdity that an out-of-state resident who transports into Illinois a firearm legally registered in his home state would be exempt from misdemeanor prosecution under the FOID Card Act, but could be prosecuted as a felon under the aggravated U UW statute.

Defendant was charged with aggravated U UW for failing to have a FOID card. Because the non-resident exception of the FOID Card Act is incorporated into the U UW statute, the trial court erred in excluding, as irrelevant, evidence that defendant had a valid gun permit from Indiana, the state of his

residence. Defendant did not need to have the Indiana permit in his possession at the time of his arrest in order to claim the exemption, because the aggravated UUW statute requires only that defendant have been issued a currently valid FOID card.

(Defendant was represented by Assistant Defender Kristine Neal, Chicago.)

People v. Fields, 2014 IL App (1st) 130209 (No. 1-13-0209, 12/31/14)

1. Defendant was convicted of aggravated unlawful use of a weapon under [720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(I\)](#), which defines the offense as carrying a pistol, revolver, or other firearm on or about one's person or any vehicle or concealed on or about one's person except when on one's land or legal abode, "or on the land or in the legal dwelling of another person as an invitee with that person's permission." The court rejected defendant's argument that as part of its burden of proof the State was required to show that defendant was not an invitee of a resident of the apartment building in which he was arrested. The court concluded that the General Assembly intended to require the defense to bear the burden of proving by a preponderance of the evidence that a statutory exemption to the AUUW is present.

2. [720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(I\)](#), creates the offense of AUUW where a person who is under the age of 21 possesses a firearm under specified circumstances. In [People v. Aguilar, 2013 IL 112116](#), the Illinois Supreme Court found that the Class 4 form of AUUW violated the Second Amendment. Here, defendant argued that the blanket prohibition of firearm possession by a person under the age of 21 also violates the Second Amendment.

The court rejected this argument, finding that the limitation of possession of firearms by persons under the age of 21 has historical roots and does not affect conduct at the core of the Second Amendment. Applying the intermediate scrutiny test, the court concluded that the prohibition on handgun possession by persons under the age of 21 is reasonably related to the substantial governmental interests of limiting the possession of firearms by a subset of the general population which is likely to be less responsible and mature and deterring illegal activity by a group of citizens which is at risk for engaging in illegal, gang-related activity.

(Defendant was represented by Assistant Defender Tonya Reedy, Chicago.)

People v. Wiggins, 2016 IL App (1st) 153163 (No. 1-15-3163, 12/8/16)

Defendant, a resident of Texas, was convicted of two counts of aggravated unlawful use of a weapon for possessing a weapon in his car without a FOID card and possessing a firearm on his person without a FOID card. [430 ILCS 65/2\(b\)\(10\)](#) creates an exemption to the FOID card requirement for non-residents of Illinois "who are currently licensed or registered to possess a firearm in their resident state." Defendant argued that the FOID card exemption applied because Texas allows its citizens to possess a weapon without obtaining a license and because defendant obtained a permit to possess a firearm while serving in the United States Army Reserves at Ft. Bliss, TX.

The court rejected defendant's arguments.

1. The court concluded that the FOID card exception applies only to residents of states which require their citizens to either obtain a license or register in order to possess a firearm. The court found that by passing the FOID Card Act, the legislature intended to establish a regulatory system for the possession of firearms. The legislature provided a FOID card exception for licensed nonresidents who complied with a mandatory licensing process in their home state because it presumed that such a licensing requirement would involve a vetting process which ensured that a gunowner satisfied certain safety or eligibility requirements. Similarly, the legislature could presume that a registration process would track the identity of gunowners and perhaps of the guns they acquired.

The legislature did not intend to create an exception for the residents of states which did not have a licensing or registration requirement which involved such a vetting process. Thus, the Texas statutory scheme permitting the carrying of weapons without any licensing or registration requirement does not qualify Texas residents for the FOID card exemption.

2. Similarly, defendant's military permit did not satisfy the requirements for the FOID card exception. Section 2(b)(10) refers to a licensing and registration process in the defendant's "resident state," not a regulatory process for possessing weapons on a military base. In addition, although the legislature created exemptions from the AUUW statute for armed forces members who are engaged in official duties, it did not choose to create such an exemption for military personnel who were not involved in official duties.

3. The court rejected the argument that the Illinois FOID card requirement violates the Second Amendment as applied to a resident of a state that does not have a state licensing requirement. Defendant raised both facial and "as applied" arguments that the ban on possession of firearms by out-of-state residents whose state did not have a licensing requirement amounted to a flat ban on possession of firearms in Illinois.

A two-step approach is applied when resolving Second Amendment challenges. First, the courts look to the text and history of the Second Amendment to determine whether the challenged law imposes a burden on conduct that was understood to be within the scope of the Second Amendment's protection at the time of ratification. If the historical evidence is inconclusive or suggests that the regulated activity is protected, the court applies "the appropriate level of means-end scrutiny" and examines the "strength of the government's justification for restricting or regulating the exercise of second amendment rights."

The court acknowledged that **Aguilar** recognizes a Second Amendment right to possess a firearm for self-defense outside the home. However, **Aguilar** also found that the right to possess a weapon is not unlimited and may be subjected to meaningful regulation. In [People v. Mosley, 2015 IL 115872](#), the Illinois Supreme Court found that the FOID card requirement of the AUUW statute is a meaningful and justifiable regulation of firearms possession.

Thus, under **Aguilar** and **Mosley**, the Second Amendment is not violated by a requirement that a person who wishes to possess a firearm in Illinois must obtain a FOID card. Similarly, the legislature did not violate the constitution by limiting the FOID card exemption for non-Illinois residents to persons who have undergone a similar licensing procedure in their own state.

Although defendant was ineligible for a FOID card because he was a Texas resident, and Texas does not have a licensing process for the mere possession of a weapon, the court noted that Texas does have licensing for carrying a concealed weapon that is substantially similar to the process in Illinois for obtaining a FOID card. Thus, defendant could have qualified to possess a weapon in Illinois by obtaining a Texas concealed carry permit. In view of a Texas resident's ability to qualify for the FOID card exception, the court rejected the "as applied" argument that the Second Amendment was violated by limiting the §2(b)(10) FOID card exception to residents of states which had a licensing requirement.

In addition, because defendant could qualify for the FOID exemption by obtaining a concealed carry exemption in Texas, there was at least one factual situation in which the statute could be constitutionally applied to a Texas resident. Therefore, the facial challenge must fail as well.

[Top](#)